

K with 570. K. 8.

BOOKS printed for J. Walthoe.

FOLIO.

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*first part of the
this volume is what is called
seventh Modern. The next part is
fifth Modern, &
th. have been
placed first.*

MODERN
CASES
Argued and Adjudged in the
Court of King's-Bench
AT
WESTMINSTER,
In the Reign of Her late Majesty
Q. ANNE,
IN THE
Time when Sir JOHN HOLT sat
Chief-Justice there.

Taken by
THOMAS FARRERLEY,
late of the Middle-Temple, Esq;.

None of these Cases were ever before printed.

With two Tables, the first of the Names of the
Cases, the other of the principal Matters.

In the SAVOY,
Printed by J. Nutt, Assignee of Edw. Sayer Esq; for J. Walthoe
in Pump-Court in the Middle-Temple; and J. Walthoe, jun. at the
Golden-Ball against the Royal-Exchange in Cornhill. 1716.



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Pasch.

Pasch. 1^o Annæ Reg.

. In Banco Reginae.

Coram, Holt, Chief Justice.

Powys,

&

Gould,

Justices: An. Dom. 1702.

NOTE, A Return, viz. the first Return of this Term adjourned to the second Return.

Per Cur', If Jury in an inferior Court will not agree of their Verdict, the way is as in other Courts, to keep them without Meat, Drink, Fire or Candle, till they agree; and the Steward may adjourn the Court from Time to Time till they agree.

Jury in Inferior Court not agreed.

Generally a Levam fac' is not the Process of an Hundred Court, but it may be it by custom, and generally all the Hundred Courts in England have such a custom: The true Common-Law Process is a Distringas.

Levari in Hundred Court.

All misdemeanors in a Judicial Officer, is a contempt of this Court, and every day an attachment is granted against a Bailiff of an inferior Court, for granting an Attachment against all the Parties Goods. And Holt remembered a Case of the Mayor of Hertford, where a Court was held before him only, and he pretending Right to a House made himself Lessee of the Plaintiff, and gave Judgment for his own Lessee; and for this he was brought up by Attachment and layd by the

Attachment on contempt of Judicial Officers.

the heels, though he got off the easier for that he had been an Old Cavalier: This he said was in my Lord Hyde's Time; but on the other Hand an Officer is not to be punished for an Error in his Judgment.

Verdict on a
Juror's
knowledge.

If a Jury give a Verdict upon their own knowledge, they ought to tell the Court so; but the fair way had been for such of the Jury as had knowledge of the matter, before they are sworn, to tell the thing to the Court, and be sworn as a Witness.

Jury dis-
charged sans
Verdict.

Note, All this was said by the Court upon a Motion for an Attachment against a Steward of an Inferior Court, who had discharged a Jury without giving a Verdict, but the Court would hear further before they granted an Attachment.

Doctor Woodward's Case.

Judgment
on a War-
rant of At-
torney.

On Defen-
dant's de-
fault.

The Question was upon the regular entry of a Judgment upon a Warrant of Attorney. Per Cur', If a Year pass after a Warrant of Attorney given, Judgment can't be entered upon it without leave of the Court, but if one give a Warrant in Vacation to give Judgment as of last Term, his Death does not determine that Warrant, because the Party was alive at the Time of the Judgment entered; and the Time of entering the Judgment is not expressed on the Roll but in the Margin, and the use of it is for security of Purchasers only, but without it, it is good against the Party. Also if Defendant make default so as Plaintiff might have entered Judgment against him, and before actual entry Defendant dies, yet Plaintiff may enter his Judgment as of the Term in which default was made: And Holt quoted Shelley's Case, who dyed at four a Clock in the Morning of the Day on which the Recovery was, so that if you reckon Hours or Minutes, he was Dead at the Time of the Recovery had, yet it was held good: So if the Caption of a Fine be taken in the Vacation, if the Writ be returnable the next Term, the Death of the Party determines it; but if it be returnable the Term before, it shall be well notwithstanding the Parties Death.

Erroneous
Judgment.

If a Judgment be below for the Plaintiff, and Error is brought and the Judgment reversed, yet if the Record will warrant it, the

the Court ought to give a new Judgment for the Plaintiff; but if the Judgment be erroneous and against the Plaintiff in the Merits, that ought to be reversed, and a new Judgment given for the Defendant: Per Cur'. If erroneous Judgment be for Defendant, and it is reversed, and the Merits appear for Plaintiff, he shall have Judgment; but if the Merits be against Plaintiff, Defendant shall have new Judgment: So in the Exchequer-Chamber; for they are to reform as well as to affirm or reverse.

Atwood & Burr.

Error of a Judgment on a Sci. Fac. against Bail in the Mayor's Court of Maidston; the Writ did recite, that a Plaintiff was levied in Debt upon a Bond against J. S. by the Plaintiff the 17th Day of July, the 6th Year of the King, in Cur' Domini Regis villæ Regis de Maidston; and thereupon a Summons issued returnable the 31st of July, and after a nihil thereunto return'd, a Capias returnable the 14th of August following, by which the Defendant being taken, and appearing on the Return of the Capi corpus the Defendant became his Bail, and enter'd into a Recognizance to pay the condemnation with costs and charges of Suit; the Sci. Fac. did further recite a former Sci. Fac. and commands the Officer Sicut prius, &c. A Sci. Feci was return'd and Judgment against the Bail, and now upon the Writ of Error many exceptions were taken.

Error on a Judgment in Inferior Court ver. Bail on a Sci. Fac.

1. That in this case the Inferior Court can only award Execution of Goods, Lands and Tenements within their Jurisdiction, and therefore the Sci. Fac. ought to run so, and not generally as here. Exceptions to the Sci. Fac.

2. After Issue joyned and a Ven. Fac. to try it, the Defendant in the original relicta verificatione cognovit Actionem, and Judgment against him in 100l. Debt and 50l. Damages without any mention of costs, and the prayer of the Sci. Fac. against the Bail is to have Execution de debito & dampnis; so not according to his Recognizance.

3. The Sci. Fac. is in the Mayor's Name, whereas it ought to be in the King's Name, and Tested by the Mayor, it being a Process of the King's Court.

4. The

4. The Sci. Fac. recites a Plaint levied the 17th of July, and on the Record it appears to have been on the 14th

5. In a Sci. Fac. against a Recognizance it should be in ex parte, and here it is in hac parte.

6. The Command of the Writ ought to be to summon the Party, if found within the Jurisdiction, but here it is general.

7. Here went an al. Sci. Fac. upon which this Judgment is; and the first Sci. Fac. not return'd, and so they shew on the Record.

To which it was Answered,

Opinion.

1. By Holt C. J. The Recognizance is well taken, that in case Judgment be against the Defendant to levy the condemnation of his Goods and Chattels, Lands and Tenements; and the common course in the King's-Bench is so, tho' in the Common-Pleas they bind in a Sum certain, and the Summons need not be cramp't up by Words to the Jurisdiction of the Court; or that shall be understood.

2. Where the demand is of a Debt certain, one need say no more than dampna to include costs, except it be on taking a Verdict on a Tryal where costs are to be mentioned, but upon Confes. Nihil dic', &c. It is never, or at least never need to be done.

3. It is the constant practice in all Inferior Courts to make the Process in the Name of the Mayor.

4. Upon a Writ of Error there can be no advantage taken of a Variance between the Writ of Sci. Fac. and the Original Record.

5. It is true the Right way is not to say in hac parte in Process upon a Recognizance, but it has obtained now to make it either way, and we must not hinder it.

6. Answered, as in the first, supra.

I

7. Which

7. Which is the chief, he asked the Council on the other side, how they could proceed upon a Sci. Fac. which was not returned as here the first was not; for there ought to be some Answer to the Writ, as that the Party had nothing, &c. That he Sci. fecit, or non est Invent. for if there be no Return I doubt it will be a Discontinuance, and that can't be cured by Appearance; but after Verdict a Discontinuance is cured, and there being no Return to the first, or so much as a recital of it on the second, but only sicut prius precept. est; it will be hard to maintain it, and if you don't appear at the Return you can't appear at all if the Process be not continued down. If there be an Original returnable in Trinity Term and the Defendant does not appear but comes in Hillary Term, all is wrong if there be not a continuance to Hillary Term duly entered: If Sci. Fac. be returnable die Jovis prox' post tres Septim. S. Michael. if the Party appear Crast' S. Martini, it will be an incurable Gap, for none can appear when he has no Day by the Writ or on the Roll, and here is neither: And suppose the first Sci. Fac. had been well returned and an Alias issues out returnable in June, and the Defendant appears in August, all would be bad without a continuance entered till August; because without it the Defendant has no Day in Court; but he said perhaps the want of a Return of the Sci. Fac. might be cured by the Day on the Roll where the Teste and issuing out of the Writ is, which perhaps may be a ground for an Alias and also a Day for appearance; and he said, that upon pleading the Statute of Limitation, he always used to plead the Return and not the Purchase of a Writ; for it was the Return that gave the possession of the Cause to the Court. And if one were to continue a Latitat for several Years he must get the first returned; upon which Return you make your continuances down tho' you never take out another; but there must be a Return of the first Writ; so if a Cap. ad Satisfac. be taken out within a Year, you may continue it down as long as you please upon a Vicecomes non misit breve, and not be put to a Sci. Fac. so there is a vast difference between the Writ to which the Defendant has an Answer, and one to which he has none; for if it be a Writ to which the Party has a Plea, there must be some sort of a Return, or that it came tarde, but still there must be some Return; and for this he quoted the Case of Sir John Vidian and Welling; and can any Court hold Plea of a Writ before it comes back to them? And if you come to set it forth by Sicut alias, you

Discontinu-
ance.Misconti-
nuance, &c.

ought to set it out at large; and he said he would support it if he could for the sake of the Suitors, who have been at the Charge of purchasing the Franchise, and not for the sake of the Steward; for they generally oppress the People. [This was Mich. 13. W. 3.]

Objection
to the De-
claration,
&c.

Opinion.

Vide 1 Vent.
78.

Objection
to the Re-
torn.

Respons.

And the Case was Argued again this Term, and Broderick took Exceptions: First, That the Original Declaration was that the Defendant per Scriptum suum Obligatorium, &c. The Defendant pleads non est Factum, and a Venire to try the Cause was ad recognoscendum si Scriptum Obligatorium pred' was the Deed of the Defendant, which he said was a contradiction, and then there being no Day on the Roll to the Party but the Day on the Venire, which is none, the Venire being contradictory, the Confession of Relicta Verificatione is void, and the Judgment grounded thereupon erroneous. But answered by Holt, Take it to be so, and that it is a plain Discontinuance, which is the utmost you can pretend, you can't take Advantage of that in an Error upon the Judgment on the Sci. Fac. against the Bail. If Bail be to an Action in this Court, and a Sci. Fac. against the Bail, and Judgment against them by Nihil Dicit, in a Writ of Error of that Judgment they can't say that there was no Judgment in the Original Action, because that ought to have been pleaded on the Sci. Fac. for tho' it be essentially necessary to charge the Bail, there should be Judgment against the Principal, yet that must be taken Advantage of in pleading upon the Sci. Fac. and never upon a Writ of Error.

Then was objected, The want of a Return of the first Sci. Fac. for an Entry was made that the Officer had not returned it; To which it was answered by Council, That true it is, upon a Writ issuing out of Chancery returnable in the Common-Pleas or in this Court, no Proceedings can be till it be return'd, for till then it is not depending; otherwise where the Writ issues out of the same Court and is returnable there. vid. 2 Ed. 4. 11. 5 Co. 47. And the ancient Practice was, that when a Writ issued out of this Court, an Entry was made of it on the Roll, and where a Man is to lose his Inheritance or incur a Penalty, he may appear on the Day on the Roll, tho' the Officer has not returned the Writ.

Holt,

Holt, The ancient way was to make a Record of the Original, and in the Common-Pleas they went by way of recital, Dominus Rex misit Breve suum clausum in hæc Verba: Now a Sci. Fac. is sued out here, and an Entry made of Vicecom' non misit Breve, and sued out and returned, and the Party appears: Why shall they not proceed upon this second Writ? And tho' the first be not returned, yet there is an Entry of it on the Plea-Roll, and upon that the other Proceedings are founded; and the second refers to it sicut alias. Opinion.

And the Case being argued again in Mich. primo Annæ, Holt declared, he had spoke to Coke Prothonotary of the Common-Pleas, who assured him he never knew a Proceeding upon a second Sci. Fac. the first not returned, and he said, that tho' the Defendant had a Day in Court upon the Sci. Fac. being entered on the Roll at its Issuing, yet there can be no proceeding upon it till it be returned, and you should get a Return made; no matter whether executed or not.

Another Exception taken was, that this was a Judgment on Demurrer, and they gave a Final Judgment without giving an Interlocutory one, Quia videt. Cur. &c. And it was said; That the Forms of Judgments ought to be strictly kept to; and therefore Concessum or Adjudicatum has been held bad in an Inferior Court. And this is like the Case of a special Verdict, where the special Fact is left to the Judgment of the Court. 1 Rol. Rep. 305, 309. 2 Cro. 372. 3 Cro. 227. 'Tis not enough that Judgment be given for him that ought to have it, but it must also be upon a right ground. Vide Owen 19. Exception to the Judgment.

But Holt said, Such a Fault would be amended now; and he said, that always upon Demurrer before you proceed to final Judgment you say, quia videt. Cur. quod Placitum, &c. Ideo consideratum est, and here they give final Judgment, when for ought appears they have not determined the Matter submitted to them; and tho' it be not essential to give a Reason for their Judgment, yet it is material to decide the Matter put in Judgment, and the Court seemed inclined to reverse the Judgment for these two Errors; which Raymond for the Defendant perceiving, he took Exception to the Writ Opinion.
of Nota,

of Error, that it was Quod in adjudicatione Executionis Judicii pred' Error intervenit, where it should be in adjudicatione Executionis Recognitionis pred'. And tho' Powel said that a Recognizance was a Judgment, and wanted nothing but Execution to make it a compleat Judgment: Holt said, yet it was another Species of a Judgment which ought to be shew-
 Writ of Error quash'd. Error for this Exception.

What an Arrest.

Per Holt, If a Window be open, and a Bayliff put in his hand and touches one for whom he has a Warrant, he is thereby his Prisoner, and may break open the Door to come at him.

Jacob versus Dallow.

Prohibition Seat in a Church.

Libel was in the Spiritual Court for disturbing in a Seat in a Church; the Defendant below comes for a Prohibition and suggests a prescriptive Right in himself, and Prohibition granted and declared on and for a consultation; the Defendant set up a prescriptive Title to himself, and traverses that of the Plaintiff, and upon Demurrer a consultation was awarded, for Per Cur', The Ordinary has of common Right the disposal of Seats, if there be no temporal Right set up against it, as the now Plaintiff has done here, viz. his Prescription, and that is now traversed.

After sentence in a Spiritual Court, they will not grant Prohibition; except it appear upon the face of the Proceedings, to be Matter out of their Jurisdiction. Quære.

Davila versus Dalmanfer.

Attachment for hindring an Award.

A Submission to an Arbitration was by Rule of Court, and after the Arbitrators had made some Progress in the matter, the Party came and snatch'd away the Papers, and so hinder'd farther proceeding: And per Holt, There ought to be an Attachment, if the Party did not enlarge the Rule and pay Costs.

Lum-

*Lumly versus Quarry, Judge of the Admiralty of
Pennsylvania.*

IT was Trover and Conversion for a Ship, which the Defendant condemned for want of being registered in England; the Action was laid in London, and being removed by Habeas Corpus to the King's Bench; the Question was, whether there should be Bail as this Case stood. And Holt said, That tho' it was upon a Habeas Corpus, they might enquire into the cause of Action, and if they saw occasion, order special Bail: For otherwise the Inferior Courts might be made use of to oppress People, by laying great Actions upon them there; and here, if the Defendant has acted as Judge, and the matter was within his cognizance, his Sentence, whether Right or Wrong, binds till it be reversed; and if it were in the Admiralty of France it would be so, and the only Remedy in such Case is to appeal.

Trover and
Conversion
for a Ship.

Bail on a
Hab. Corp.

Per Holt, The Writ of Ne Exeat Regnum ought not to be granted, but upon great Reason and Examination; otherwise a Homine replegiando may lie.

Ne Exeat
Regn.
Hom. repleg.

Queen & Ewer.

SCire Facias upon a Recognizance entered into before Holt, C. J. conditioned That one J. S. should appear to an Indictment against him, and carry it down to Trial according to the late Act of Parliament; and the Defendant demurs to it:

Recogni-
zance.

1. There is a Variance between it and the Recognizance: The Recognizance recited is, That upon Issue joined, the Defendant would give notice of Trial to the Prosecutor and his Clerk; and the true Recognizance entered into, is to give notice to the Prosecutor or his Clerk; So there is a Variance, and it is not pursuant to the Statute; for it is in a greater Sum than the Statute requires, which is only 20 l. each. It was urged on the other side, that if one would except against a Writ, he ought to have Oyer of it; and that notwithstanding it be set out in hæc Verba. But it was answered, that it were vain to demand Oyer of a Writ which is already set out in hæc Verba on the Roll. Indeed 'tis true, none can except against an Original Writ that is not set out in hæc Verba,

Variance.

Oyer of the
Writ.

Opinion. ba, without having Oyer of it. And Holt, C. J. said, That the Recognizance varies from the Statute, and therefore can't be good by the Statute; yet it may be good by the Common Law: It is true, the Recognizance, if not according to the Statute, can't make the Certiorari a Superseas, for by Statute no Certiorari shall be a Superseas without a Recognizance of 20 l. &c. But before that Statute the Judges of this Court had Power to take Recognizance, which is not taken away by the Statute; but only that they shall not be such as will make a Certiorari a Superseas: And the Writ was quash'd for the 1st Exception.

Writ quash-
ed.

Domina Regina & Paroch. de Milverton.

Order of
Justices
quash'd in
Part.

UPon an Appeal to the Sessions, they made an Order that the first Order should be quash'd; and the Party sent to the Parish from whence he was thereby removed. It was agreed, the Justices of the Sessions had only Power to affirm or quash the former Orders, but not to make a new one; but because an Order may be good in Part and void for other Part; that Part which ordered the Poor Person to be sent back was quash'd, and the rest confirmed.

Bail for a
Feme Co-
vert.

Per Holt, A married Woman is to be discharged upon common Bail of course; but if it be doubtful whether she be married or not, she shall be held to special Bail, if the Cause require special Bail.

Coroner.

It is Matter indictable to bury a Man that dies of a violent Death, before the Coroner's Inquest have sat upon him. Per Holt.

Order of
Justices.

It is a Rule of Court: That no Order of Justices, whereof an Appeal lies, be brought hither by Certiorari, till after Appeal; and if any be, that it be sent back by Procedendo: For the Original Order does not come up, but the Tenor of it, as appears by the very Words of the Return.

Feltham & Cudworth.

Statute of
Composition
of two
Thirds plea-
ded.

Scire Facias by an Administrator to revive a Judgment had by the Intestate against the Defendant, who pleads the Statute of Composition of two Thirds in Number and Value

due of the Creditors, and a Composition for Payment of 2 s. in the Pound; Ita quod he paid it within five Years after he should be discharged out of Prison; and on Demurrer, the whole Question, Whether the Defendant ought to averr that he had been in Jail: And it was urged by the Plaintiff that he ought, and that the Plea was ill for want of it; for the Intent of the Statute was, that there should be an absolute positive Composition, either to take less than the Debt, or to give a longer Day of payment; but not to discharge the whole Debt of the Creditors, by the Composition of two Thirds, which would be the Case here, if the Defendant had never been in Jail; for the 2 s. in the Pound was not payable till five Years after the Defendant came out of Jail, and that might be never if he had not been then in Jail; and then the Composition might be, that Defendant should never pay.

To which it was answered, That it is in the Power of the two Thirds of the Creditors, &c. to make a Composition general; that a contingent Composition is a Composition within their Power; besides it was said, that the matter subsequent to the Ita quod, did not depend upon it as upon a Condition precedent, but that the Ita quod was only a Limitation; as a grant of a Rent, provided it does not touch his Person, or a Grant without Impeachment of Waste, Ita quod he don't commit voluntary Waste. *Ita quod.*

Another Day the Court held it no good Composition, because it is such as perhaps the Defendant will never be bound to perform, and the Ita quod makes it a Condition precedent, that the Defendant should be discharged out of Jail; and the Statute intended a final absolute Agreement, whereby the Creditor is bound to receive so much or to give such Time, and if the Defendant does not perform such Composition, the former Debt is thereby revived. Suppose I covenant with J. S. to convey him such Lands, Ita quod he pay me 500 l. by such a Day; he does not pay the Money by the Day, I am not bound to make over to him the Estate; for where an Ita quod is annexed to an Agreement for a Thing not executed, it qualifies the matter before; and is the same thing as if it were put first: And the Ad means there should be a compleat final Agreement, and not one depending on uncertainties; now non Constat that the Defendant ever was in Prison, and therefore for ought appears, the condition precedent never happened nor is like to happen; and we can't intend he was imprisoned: *Chris.* *Condition precedent.* And

And per Omnes, All Compositions by Vertue of this Act, work by way of Defeazance, which if not performed the Original Debt arises. Judgment pro Quer'.

Toll incident to a Market.

Per Holt, A Toll is not of common Right incident to a Market; per Eundem, It has been held that an Indebitat. Assumpsit would lie for a customary fine of a Copyholder, but he said, he never could be reconciled to that Opinion.

Mayor.

Per Eundem, Without a particular Usage, the Mayor of a Corporation has not a casting Voice.

Green & River.

Statute of Limitation.

IN an Assumpsit, non Assumpsit infra sex Annos was pleaded Plaintiff replies that pro Recuperatione of the said Debt, he sued out a Bill of Middlesex which he recites in his Replication, and it appears to bear Teste, Die Lunæ post tres Septimanas Sancti Michaelis, Anno quinto, Ita quod parat. habeat the Defendant's Body Die Lunæ post tres Septimanas Sancti Michaelis, generally without telling when, and that the Defendant promised within six Years before the Issuing thereof; Defendant rejoined, that he did not promise in six Years before the Issuing thereof, and on Demurrer the Exception was to the Replication, that it did not appear when the Writ was returnable, for it could not be intended to be immediate without it had been so said expressly; and in fact a Bill of Middlesex is never returnable immediate, and 'tis true, the Writ it self does never mention the Year in which it is returnable; but when one pleads a Writ, he ought to do it: And Holt said, The Statute of Limitations was one of the best of Statutes, and the Pleading thereof no discouragement to any body; and Defendant had Judgment Nisi.

Judgment Nisi.

Sir George Tuke's Case.

Assumpsit for non-payment of Money on delivery of a Note.

IN Assumpsit the Plaintiff declared, That he was possessed of a Note of the Defendant's by which the Defendant promised to pay him so much Money; that the Defendant in consideration the Plaintiff would deliver him the said Note, promised to pay him the Money, that he thereupon delivered him the Note; after Verdict it was moved in Arrest of Judgment, that here was no consideration; for it did not appear what the con-

consideration of the Note was; and if the Note were without consideration, the Delivery of it up can't be one. Vide Pal. 171. Saund. 136. But per Cur. 1. Delivery of the Note being said indefinitely, it shall be intended a Delivery forever; and tho' a Note for the payment of Money does not carry a consideration in it self, yet it is Evidence of a Debt, and by consequence a means whereby he may recover his Money; and the parting therewith is a consideration, and the Defendant has admitted it to be upon consideration by demanding it to be delivered. And if the Case had been, that this had been the Note of J. S. for payment of Money to J. N. and J. D. in consideration that J. N. would deliver the Note to him had promised to pay him, it had been a good consideration; for it is not necessary the Matter of the consideration should be of Advantage to the Defendant, so it be any trouble or disadvantage to the Plaintiff. Judgment pro Quer.

Judgment.

A. takes a Judgment in the Name of B. who dies, and Administration is committed to another: A. enters Satisfaction on the Judgment; the Administrator of B. moves that the Entry of Satisfaction be vacated, and this appearing on a Report of the Master to whom it was referred, the Court said the Defendant had good Equity, but they could not help him, and the Rule was to vacate the Entry of the Judgment Nisi.

Satisfaction acknowledged of a Judgment.

Prideaux & Morrice:

It was an Action on the Case in the Common-Pleas, against the Defendant Morrice, being one of the Aldermen of the Town of in Cornwall, for not returning the Plaintiff, he being duly elected a Member of Parliament for that Borough; but instead thereof falsely and maliciously returning J. S. who was not duly chosen. Upon a special Verdict finding all the Declaration, and farther that the Right had not been determined in the House of Commons, and that there was another Alderman still living; the Court after several Arguments, delivered their Opinions by Trevor, C. J. Blencow, Powell and Nevill;

Parliament. False Return.

We are all of Opinion, that the Defendant ought to have Judgment.

E

1. We

1. We don't give our Opinions how it would be if the Matter had received a Determination in the House of Commons in Favour of the Plaintiff.

2. We give no Opinion how the Action ought to be conceived; whether it ought to be against both the Defendants, or whether it might be against one of them, because our Opinions are that it does not lie against them any way.

So that our first Reason is, for that the Judging of the Right of Election belongs to the Parliament, that is, to the House of Commons; and that is the proper Jurisdiction for determining such Matters, and therefore it would be very absurd and inconvenient, if it should be tried by a Jury or Court of Westminster-Hall, in an Action on the Case; for that would produce a different Determination of the same Matter, by two Independent Jurisdictions; one might have Judgment and Damages against him in Westminster-Hall, for a Matter in which he might have done his Duty by a Vote of the House of Commons; and of which the Commons are the sole Judges.

Obj.

Obj. This inconvenience of clashing Jurisdictions would ensue in Cases where the Act of Parliament gives the Action, and a particular Penalty; and yet none will say but the Action will lie notwithstanding, even before any Determination of the Matter in Parliament.

Resp.

Ans. Where the Parliament gives the Courts of Westminster-Hall a Jurisdiction, let the inconvenience be what it will, we may exercise the Jurisdiction; but it can't be said, because the Parliament has given us a Jurisdiction in particular Instances, that by the same Reason it has given it to us in all Cases: And the Argument is, to say because the Parliament has given us a Remedy, therefore it lay at Common-Law, when the contrary Inference is much more natural; and if the Parliament had intended to give a Remedy, it would have given an Action of the Case; for that had been the most adequate Remedy, and would suit every Bodies Case, And the Statute 23. of H. 6. that gives a Penalty in some Cases, takes Notice, that before that Statute, there was not sufficient Remedy.

Obj.

Obj. Not inconvenient that there should be concurrent Jurisdictions, for the Queen's-Bench, Common-Pleas, and the Court of Exchequer are so.

Obj.

Ans. It is true; but that works no inconvenience to the Subject; for if the Suit be commenced in one Court, and after in another; that Court which has first Possession of the Cause, shall determine it, and it is a good Plea in Abatement for a Defendant to say, that there is an Action depending in another Court for the same Cause; and a Judgment in one Court is pleadable in Bar to an Action for the same Cause in another: But that will not be so in the present Case.

Resp.

Obj. The Case of the Earl of Banbury, where the Court of Queen's-Bench did determine the Right of Peerage.

Obj.

Ans. That Cause is not a Precedent to be followed, for the consequence of it is a Failure of Justice to this Day; so that that Case is a strong Instance of the Mischief that we would now avoid.

Ans.

Another Argument against it is, that of Littleton upon the Statute of Merton, a non usitato, the Mischief has always been as appears by the Acts of Parliament giving Remedy therein. Vide Acts of H. 4. and H. 6.

Another Argument against it is, That the Right of a third Person would be tried here between Strangers: So it would be determining his Right by a side Wind.

Carlile & Greenwood.

Scire Facias brought on a Judgment in the Queen's-Bench at Westminster, and the Administrator produced Administration, by the Arch-Bishop of York; and because the Judgment was Assets at Westminster in the Province of Canterbury, the Administration in the Province of York did not extend to it.

Lylly's Case.

Covenant lies not against an Apprentice being an Infant. Apprentices
1 Cro. 179. 1 Mod. 271.

Be-

Beverly & Pim.

Traverse.

CASE upon several Promises; the Statute of Composition of two Thirds pleaded in Bar; But the Plaintiff shewed the Contract to have been since the Time of the Statute, which the Defendant did not traverse in his Plea, as he ought to have done; for if you vary from the Time in the Declaration, and make such Variance material, you ought to traverse the Time in the Declaration: And Judgment pro Quer' Nisi.

Domina Regina & Clerk.

Coroner's
Inquest tra-
verfable.

IT was an Inquisition taken before the Coroner, Super visum Corporis of one who had killed himself; and first was said per totam Curiam, that such Inquisition is traversable:

1. That it wanted the Word Murdravit, for it was that the Party Deum præ Oculis non habens, solus existens in Domo sua Mansionali voluntarie felonice & ut Felo de se cum cultro Pretii, &c. quem in manu sua dextra tenuit, Jugulum suum secuit & seipsum occidit. And it was answered, that the Word Murdravit is not necessary in such an Inquisition as this, tho' it be otherwise in an Indictment of Murder of another Person, because there are Degrees in the Offence of killing another, as Manslaughter, Murder, which ought to be expressed in Words, but in the Offence of killing one's self there can be no such degrees. 1 Keb. 66. held by Twisden that the Word Murdravit is not necessary in such an Inquisition, tho' there was an Opinion to the contrary in the Case of Alderman in 3 Keb. 604. Dyer 304. 2 Lev. King & Parker. Holt said, If it was not for the Authority of Alderman's Case in my Lord Hales's Time, he would think it not necessary in the Case of Felo de se; for he said the Reason why Murdravit is necessary in an Indictment of Murder, is because Clergy does not lie in Murder. But most surely a great defect in this Inquisition is, that it is not said he died of the Wound set forth in the Inquisition: For to what purpose has the Queen a View of the dead Body, but to shew the Jury that the Wound is mortal? And for this Fault the Inquisition was quashed; for it is not enough to say that it was Felonice, but also it ought to be shewn how it was Felonice. Per totam Curiam.

Coroner's
Inquest to
have a view,
that the Ju-
ry may see
the Wound
mortal.

Note,

Note, Midsummer Day was on Wednesday this Year, and if that had not been, that Wednesday had been the last Day of Trinity Term, but now it was on Thursday: For per Holt, Trinity Term may begin on Midsummer Day, but can't end on it; there can be no Return this Year in tres Septiman' Trin' but it must be Die Jovis post tres Septiman' Trin', and this he said had not happened in one Hundred Years before.

Trin. Term
cannot end
on Midsum-
mer Day.

Adam's Case.

A Capias in Withernam was tested the 1st. of May, and returnable Die Jovis post tres Trin'; and the Court ordered the Attorney and Filazer to attend; for they look'd upon it to be a great Oppression to make such a long Return in Order to deprive one of his Liberty so long. And here he gave Bail Body for Body to appear at the Return of the Writ; and the Withernam was superseded.

Withernam
superseded.

Information against the Play-House for Acting profane and lewd Plays, and they being bound by Recognizance to try it made up the Record wrong, viz. Lincoln's-Fields for Lincoln's-Inn-Fields, thinking to be acquitted upon that Variance; but Holt ordered it to be found Specially, and Mr. Attorney moved to have their Recognizance estreated.

Play House
prosecuted.

Sir Richard Newdigate was bound by his Recognizance for a Twelvemonth to keep the Peace against his Daughter, and for his Appearance the first Day of next Term, and the Court said, they could not dispense with his Attendance, as they could if it was de Die in diem, but here he was bound by the Condition of his Recognizance.

Recogni-
zance of the
Peace against
the Father.

Term. S. Trinitatis,

Anno 1 Annæ.

Machil versus Clerk.

*J. C. 2. Salk. 619.
2. L. Raym. 778.
Com. 119. 120.*

Tenant in Tail, in consideration of his Son's Marriage, covenants to stand seized to Uses; but afterwards suffers a Recovery to other Uses, and the Uses on the Recovery adjudged good.

Argument.
contra.

E Bro: in this Court, on a Judgment given in the Common Pleas, where the question upon a Special Verdict in Ejectment was this: A Tenant in Tail, in consideration of a Marriage of his Son, covenants to stand seized to the Use of himself for Life, Remainder to the use of his Son and Heir, and the Heirs Male of his Body by his intended Wife, with several Remainders over; and after he suffers a Recovery in which he himself is Tenant to the Precipe, and vouches over the common Vouchee; which Recovery was to other uses than those mentioned by the Covenant: So the question was, Whether the Tenant in Tail, notwithstanding the Covenant to stand seized, continued seized in Tail, for then the Recovery was good, otherwise it could not be good in this Case, he coming in as Tenant to the Precipe. And Williams here argued that the Covenant was void. Thus, Estates Tail owe their being to the Statute De Donis, which is the only Law which restrains Conveyances of them at this Day, and the Care of that Statute regards only the Issue and those in Reversion or Remainder, and does in no way extend to the Party himself during his Life: And in favour of solemn Conveyances, the Issue himself and those in Reversion and Remainder, are put to their Action in Case of Feoffments and Fines by a Tenant in Tail, and in all Cases the Tenant himself is bound by his Alienation or Conveyance, as well since as before the Statute.

Until the Statute 27 H. 8. cap. 10. no legal Estate pass'd by the conveyance of a Covenant to stand seized, which was but only a Use; but now by that Statute, the Use draws the Possession to it; and then by this Conveyance the Tenant in Tail is seized to his own Use for Life, the Remainder to J. M. his Son in Tail; which conveyance the Tenant in Tail can't

can't avoid in his own Life, and then it follows that he only has an Estate for Life with Remainders over, so that the suffering of a Recovery is a Forfeiture of his Estate, and the Covenant to stand seized by the Rule of Grants, shall be taken most strongly against him; and most advantageously for those who are to take by it, and the rather for that here the Uses are to him for whose Benefit the Statute De Donis was made, videlicet. the Eldest Son, that is, the Heir Apparent.

Obj. This being by way of Covenant to stand seized, nothing passes but what may lawfully pass as in Case of a Grant, and then it will make no alteration of the Estate-Tail.

Obj.

Ans. It is true a Covenant to stand seized, does not work a discontinuance, yet all the Estate may be as much dissolved out of the Tenant in Tail himself, as if there were a discontinuance, and the Covenant will not pass away the Remainder limited over, but it will pass a base Fee, or put the Estate-Tail in Abeyance. Suppose he had covenanted to stand seized to the Use of his Son immediately, or to the Use of a third Person immediately, with Remainders over, would not that put the Estate-Tail in Abeyance; or pass a base Fee? And how does this Case differ from that? A Covenant to stand seized operates like a Bargain and Sale, that is by way of Use; both enure by way of Grant, and receive their Virtue from the Statute of Uses; and all the Difference is, that the Statute of H. 8. does ordain, that no Estate of Freehold shall pass by the Statute of Uses, in case of Bargain and Sale, till enrollment, but that is only a Condition sine qua non, and it is the Statute 27 H. 8. c. 10. that both raises the Use and creates the Estate; then if Tenant in Tail bargains and sells his Estate to a Man and his Heirs, a base Fee will pass. Vide Plow. 557. 3 Co. 84. Cro. Car. 489. And tho' Littleton says, That if Tenant in Tail grants totum Statum suum, the Grantee hath but an Estate for Life of the Tenant in Tail, yet that must be meant, that he has but an absolute indefeasible Estate only during his Life, but still during his Life he has a base Fee; and the Issue after the Death of the Tenant in Tail, may bring a Formedon against the Grantee, which shews the Estate was not absolutely determined by his Death. 10 Co. 98.

Resp.

If Tenant in Tail bargain and sell to another and his Heirs, and after levy a Fine to A. and his Heirs, to the Use
of

of A. and his Heirs, the Bargainee now has an Estate to him and his Heirs, during the continuance of the Estate-Tail, which the Fine to the Use of another could not give if he had it not before. Some hold that by the Bargain and Sale of the Tenant in Tail to a Man and his Heirs, he only has a descendible Freehold, and the Estate-Tail is in Abeyance, 1 Inst. 331. a. And after such Bargain by Tenant in Tail to another and his Heirs, the Tenant in Tail has no Reversion or Remainder in him; and he can't punish Waste or enter for a Forfeiture; and therefore all the Right of the Estate will be out of him, and by consequence in Abeyance; and here if the right of Entail be in Abeyance, it will do as well for my purpose, for if it be out of him at the Time of the single Voucher, it will be a void Recovery.

Abeyance.

If Tenant in Tail covenant to stand seized to the Use of one for Years, remainder to the Use of his first Son in Tail; this puts the Estate-Tail in Abeyance; so if he covenants to stand seized to the Use of A. for the Life of B. and after to the Use of C. this puts the Estate-Tail in Abeyance: And it is no Answer to say, that where Tenant in Tail covenants to stand seized for Years, or for Life of another; still there remains something more in him which he may grant over, for the Estate for Years, or for the Life of the other may determine, during the Life of the Tenant in Tail; and then the remainder over may possibly take; but where he covenants to stand seized for his own Life, he has done what he can lawfully do; and any Covenant over is what he can't lawfully do, and therefore it is of no Force: For where Tenant in Tail covenants to stand seized to the Use of another, during his own Life, still there remains something in him, in respect whereof he can punish Waste and enter for a Forfeiture: And why can't he grant this Interest out of himself by way of Remainder, as well as grant it out of himself in another manner, where he grants totum Statum suum, in which Case the Estate-Tail is so entirely out of him, that he can't punish Waste or enter for Forfeiture? Tenant in Tail grants his Estate to A. and his Heirs during the Life of the Tenant in Tail, Remainder to B. and his Heirs during his Life: Both A. and B. by possibility may take, tho' the Estates have the same Limitation, viz. the Life of the Tenant in Tail; and this is like the common Case in Settlements, where an Estate is limited to Husband for Life, Remainder to Trustees and their Heirs for the Life of the Husband, for supporting and pre-

preserving contingent Remainders; and if this last Case be Law, it proves that Tenant in Tail has something in him, after giving away an Estate for his own Life; and if he has any such thing in him, he may grant it out of him, 1 Inst. 331. a. Where Tenant in Tail grants totum Statum suum, he has not only granted all his Estate for Life, but also all his Right to the entail out of himself, and if he could do so, he has done it here; and then the Recovery after, with single Voucher, can't be good, Herly 110. Tenant in Tail covenants to stand seized, to the Use of himself for Life; Remainder to Use of his eldest Son, no Use arises to the Son, if not during the Life of the Father only. He owned that the Case of Blythman in 1 And. 291. 3 Cro. 279. was in part against him, vid. Yelv. 51. 1 Brown. 193. same Case; and that Marriage is a good consideration to raise a Use, Vid. 2 Cro. 168. 2 Rol. Abr. 784.

Cowper contra, And he agreed if the Estate-Tail was altered by the Covenant, the Recovery was void; secus not, and for Authority for him, he quoted 3 Cro. 895. 1 Co. 52. 3 Cro. 471. Mo. 32. Pl. 105. And. 160. Mo. 683. Pl. 540. Ro. 257. And as to Littleton's Case, That if Tenant in Tail grant totum Statum suum, that the entail is in Abeyance, he quoted Pl. 561. the whole Court to the contrary, and he said no ancient Authority did agree therewith. Besides tho' it be allowed to be Law, there is a great difference between Covenant by Tenant in Tail to stand seized, and a grant of totum Statum of him: First, The Covenant is to stand seized of the Estate that he has to Use, and that is an Estate-Tail, and one can't be seized of an Estate-Tail to Use. Vid. 2 Rol. Abr. 780. Cro. Car. 401. 1 Inst. 19. So that when Tenant in Tail covenants to stand seized of his Estate, it can't be his Estate-Tail; then it must be only of the Estate he lawfully can be seized of, and that is for his Life only; and it will be void as to the Estate-Tail.

Argument
for the Re-
covery.

Holt, C. J. How do you distinguish a Bargain and Sale by Tenant in Tail to a Man and his Heirs, from a Covenant to stand seized, to the Use of him and his Heirs? Both Conveyances raise an Use without Transmutation of Possession, what Estate shall a Bargainee in Fee of Tenant in Tail have? You say an Estate for Life only: If so; upon the Death of the Issue in Tail, the Estate of Bargainee determines, and yet that is not so till Entry of the Issue in Tail, and this

Opinion of
Holt, C. J.

this does in no wise contradict the Statute de Donis, for the Donee in Tail grants the whole Estate out of him; but the Issue after his Death may determine it, and he relied on Seymour's Case: For in that Case, if it were determined by the Death of the Tenant in Tail, the Fine would be a Discontinuance; whereas it enured by way of Confirmation of the base Fee that past by the Fine, and the only difference is that it was a defeazable Fee, before the Fine, and by the Fine, becomes an indefeazable Fee. And if Tenant in Tail made a Feoffment, and after levied a Fine, that Fine binds the Right of the Entail, tho' the Feoffor had it not in him at that Time; it is true a Tenant in Tail can't be indefeazably seized to Use, and none can give an Estate-Tail to Use, but the Use will be void: And where Littleton puts his Case of totum Statum suum, he is to be intended where it is granted by him to another and his Heirs, for otherwise it would not put the Estate-Tail in Abeyance; and such a Grant without Livery, would make a Discontinuance, and is a base Fee, whereby the Issue is put to his Entry. Vid. Walsingham's Case in Pl. 1. Cro. 427. Stone's Case: Tenant in Tail, reversion to the King, commits Treason; the Question was how the King should have the Estate, by the Statute of 26 H. 8. or by determination of the Estate-Tail, but the Case of a Covenant to stand seized may differ from that of Bargain and Sale, for the Right of the Estate-Tail is conveyed away in the Case of Bargain and Sale, but in the case of Covenant to stand seized to his own Use for Life, he is so already; and he can't bind his Heir, without making an Alteration of the Estate-Tail; if this had been a Remainder to some Body more remote than the Heir, it would be more questionable.

Opinion of
the Court
and the Rea-
sons thereof.

At another Day, the whole Court delivered their Opinion, by the Chief Justice, That the Recovery notwithstanding the Covenant to stand seized was good, and the Chief Justice said, It would be reasonably expected from them to give the Reasons of this their Opinion, for tho' there were several Authorities express in the point, yet the Reasons of these Judgments were not so obvious; for it has been a question if a Tenant in Tail, by Bargain and Sale, Lease and Release, or Covenant to stand seized, conveyed the Lands whereof he is seized in Tail, to another and his Heirs; Whether that Estate so conveyed does actually determine (as Littleton seems to hold) upon the Death of the Tenant in Tail

yet we know the construction that has been made upon them. If a Tenant in Tail make a Feoffment or levy a Fine, it is so far a prejudice to the Issue, that he shall be put to his Action; and his Entry is taken away, and he has no remedy but by a Formedon in Descender, and yet such Fine or Feoffment was never taken as a breach of the Statute of Donis, sure then it shall be no breach of the Statute to have him put to his Entry, to recover the Estate? Since then it is his Inheritance, and all in him, and that a Power of Alienation is incident to his Property that he has, and that an Alienation made by him to put the Issue to Entry is no Breach of the Statute of Donis: From hence I do infer, that such Estate by Bargain and Sale, &c. made by him, to one and his Heirs, is not actually determined by his Death; now as for Authorities in the case, Vide 10 Co. 95. Seymour's Case is in point. Tenant in Tail bargains and sells to B. and his Heirs; and the Court held, that the Bargainee had a descendible Estate, whereof his Wife was dowable, and that by the bare Bargain and Sale; and tho' there was a Fine after, which barred the Issue, that only excluded the Issue in Tail, but not enlarged the Estate of the Bargainee, for if he had not a Fee before, the Fine after could not have given it to him, for it did not work by way of enlargement of an Estate.

He quoted the Case of Fines in 3 Co. where it is said fo. 84. That Littleton's words in Sect. 612. are not to be taken strictly and literally: And he said it was very true that a Bargain and Sale by a Tenant in Tail to one and his Heirs, does not work a Discontinuance; but yet the Estate passing by it, does not determine till entry of the Issue: And where Littleton says, That he can't dispose of more than for his Life, that is, he can't rightfully do it, so as to bar his Issue, but he may convey the Estate that shall continue longer, if his Issue will not avoid it; and the Case of Fines says besides, that if Tenant in Tail be of a Rent or Advowson, and he grants all his Estate in the Rent or Advowson to one and his Heirs, tho' he dies, the Rent or Estate in the Advowson is not thereby determined, but at the election of the Issue in Tail; for if the Alienation be with Warranty, and the Issue bring Formedon, and Alienee pleads Warranty with Assets in bar, he shall be barred by Reason thereof, so that till it be done by the Issue in Tail to determine it, the Alienation continues; if it be of Rent, and he bring Formedon, collateral Warranty shall bar him. Winch's Rep. 5. Tenant in Tail bargains and sells an

an Adowson to another and his Heirs; and the question was, Whether he was remitted? It was not a doubt but a Fee-simple passed by the Bargain and Sale; indeed Hobart held the Issue was remitted, but the other two held he was not, and if the Bargain and Sale had been determined by the Death of the Issue, there could not have been a question of the Remitter, and that plainly shews that the Estate, which pass by the Bargain and Sale, had existence after the Death of the Tenant, tho' it were an Adowson. But this is no great question, if you consider the common Case of Lease for Years made by Tenant in Tail, not warranted by the Statute of 32 H. 8. such Lease is not void by the Death of Tenant in Tail, the Issue must enter to avoid it; for if he does not do so, but accepts the Rent, he is bound by the Lease, which shews it was not determined by the Death of Tenant in Tail; for if it were, no subsequent acceptance of the Rent would have helpt it.

Another Instance comes home to the Case in question, and that is the Case of an Exchange; the Estates must be equal, you can't give an Estate for Life in change for an Estate in Fee; you may indeed give an Estate for Life, in exchange for another Estate for Life; an Estate in Fee for an Estate in Fee, that is, each Party taking, must take an Estate of equal Extent; if one give an Estate-Tail, and takes a Fee, it is bad: If Tenant in Tail and Tenant in Fee make an Exchange, they both have Fee-simple, (1 Inst. 51. a) without more a-doe; for in Case of Change there needs no Livery, but only a reciprocal Execution by both Parties, and this is notwithstanding a good Exchange, and a Fee-simple passes from the Tenant in Tail, and shall continue till avoided by the Issue; and here he is not put to his Action to avoid it, because here being no Livery there was no Discontinuance. 1 Inst. 332. Then the Exchange must have this effect, that it passes a base Fee till avoided by his Issue: And if the Issue will not agree to it, he may waive the Land in Fee conveyed to him, and enter into the other. But if he does not doe so, but continue in the Land given, the Exchange stands good during his Life; and after his Death his Issue may avoid it by entering, and so on, toties quoties. It does therefore follow that a base Fee does pass, otherwise it could not be a good Exchange; if so, then there is the same reason, that when Tenant in Tail bargains and sells, leases and releases, covenants to stand seized to Uses in Fee, such Conveyances should pass a base Fee; which

Exchange of
Estates.

should continue till determined by the Act of the Issue in Tail.

But to consider the Case in question: Notwithstanding this be so, that the Bargainee, Releasee or cestui que Use, of a Covenant to stand seized, &c. has a base Fee, how happens it here, that the Covenant to stand seized in the Case in question, does not alter the Estate-Tail, but that it still continues? The Reason is, because that tho' the Tenant in Tail may make Conveyance of the Estate in his Life, which shall be good and binding of the Estate-Tail, till avoided by the Issue; yet any Conveyance he makes to commence after his Death shall be void, if by possibility it may not take effect during his Life; and the Estate by this Covenant is to commence from and after the Death of the Tenant in Tail; and the Instance before put of the Lease for Years, is apposite to this purpose.

If Tenant in Tail make a Lease for Years, not warranted by the Statute, to commence immediately, or which may possibly commence during his Life, such Lease is voidable only upon his Death; but if he make a Lease to commence from and after his Death, that Lease is ipso Facto void, by the very creation of it. And that is the Book of Dyer 297. Pl. 25. tho' there was one Judge of another Opinion, 2 Cro. 457. Well then; this Remainder is limited to commence from and after the Death of Tenant in Tail; therefore it is void. But you'll say, here he covenants to stand seized to the Use of himself for Life, the Remainder over; so that the Estate to arise upon the Covenant to stand seized did arise in his own Lifetime: To this they answer, that the Covenant to stand seized to the Use of one's self is void, except it be for the sake of the Remainder over, and the Remainder being to commence after his Death is void, and the Covenant to stand seized to his own Use can't be good for the sake of a void thing; if one covenants to stand seized to his own Use in Tail, it had been good; for which he quoted Carrington's Case.

Now what is the Reason, that such Estate is void, when it is limited to commence after the Death of the Tenant in Tail? It is because 'tis to commence at a Time, when the Right of the Estate out of which it would issue, is in another Person by a Title paramount the conveyance, viz. per Form. doni. Tenant in Tail has an Estate out of which he may carve out other Estates, provided he does it out of the Estate

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in himself, so as to make it rightful in its creation, but otherwise not; for it would be injurious to make good a Lease or other Estate commencing upon the Right of another, whose Title is paramount the Lease or Estate so made; and in the principal Case, the Issue in Tail has a Title paramount the Title of the Remainder, by virtue of the Covenant, the very Minute the Remainder would take effect; And that is the only true Reason; and therefore to make such an Estate to take effect upon the possession of the Issue, whose Title is paramount, would be to make an Estate take by wrong the very Minute it has its creation. Now for Case and Judgment in the principal Point there are many. 2 Rep. 52. Yel. 51. Mo. 883. 3 Lev. 291. 3 Cro. 895. And the Words of the last Book are full of the Reason that I give.

I do, you see, disagree with Littleton, for if you take him according to the Letter, it contradicts the Case of Fines, 3 Co. And if I have contradicted Littleton, I have done it upon great Authority, Viz. the Case of Fines, and Hob. 319. where he says, the Law abhors Abeyance, and never suffers it but in Case of necessity.

And he took notice of the Case in 1 Saund. 260. in the Common-Pleas, which Authority he said was against him upon the first matter, viz.

1. If Tenant in Tail make Bargain and Sale, the Bargainee has no more, says that Book, but for Life of Bargainor, tho' the Habendum were to Bargainee and his Heirs, and so they then held it. But I must take the Liberty to disagree with them, because I have the Authority of Seymour's and other Cases with me, for we may with as much Decency deny their Authority, as they have denyed that of Seymour's Case. For a Fine to a stranger shall extinguish the Right of an Intail, but can't enlarge any Estate before made out of the Estate-Tail, so that if the Estate which the Tenant in Tail makes, may possibly commence during his Life, such Estate shall after his Death continue till avoided by the Issue, but if it can't commence till after Death of Issue, it is absolutely void.

2. If Tenant in Tail covenant to stand seized to the Use of J. S. who is of his Blood, for his Life, with Remainder over to another, and dies before the Remainder happens, yet the
the

the Remainder is good till it be avoided by actual entry of the Issue; otherwise it will exist after the Death of the Issue, because the Estate for Life had taken effect; and the Remainder might have taken effect during the Life of the Tenant.

Judgment
affirmed.

3. If Tenant in Tail make a Lease and Release to the Use of himself for Life, with Remainder over to another, the Remainder over is good till avoided, tho' it be to commence after the Death of the Issue in Tail; and the Reason is, because it issues out of the Estate by Lease and Release, which is good, till avoided by Entry: He said, the grounds he went upon were his own, but his Brothers concurred with him in the main, and the Judgment in the Common-Pleas was affirmed.

Domina Regina & Rogers.

Information
in the
Mayor's
Court, Lon-
don.

An Information was against him in the Name of the Common Serjeant of the City of London in the Mayor's Court, grounded upon a custom in London to punish in that manner, any that should give opprobrious or affronting Language to any of their Aldermen. The Information did set forth another custom, for holding a Leet on such a day yearly in the several Wards, that Sir R. Jeffreys was Steward of such a Leet in such a Ward, and late in the said Court, held at, &c. as Steward: That the Defendant made an Assault upon him, and contemptuously said, He had as much to do there as he had, that he mistook himself, for he was not now among his Bridewell-Birds, and that the next Year he should not keep his Court there: This matter being brought up by Habeas Corpus, it was moved that the Defendant should be discharged. For,

Vide Sir
Tho. Jon.
229. 3 Cro.
78. Mo. 347.
2 Lev. 200.
1 Vent. 16.

1. There is nothing in the Words, for which an Indictment does lie, except the Assault; for at most they are but words of disrespect, for which there is no other Remedy then to bind the Party to Good Behaviour, or for want of Sureties to commit him, and that may be lawfully done in Case of disrespectful Words to a Magistrate; or if one in a Court behaves himself insolently, he may be committed immediately as for a contempt. And besides it was said, there was nothing in the Words, but what was true.

1. The

1. The Defendant was a Suitor, therefore he was bound to be there, and he had a Right to be there.

2. The Steward was not among Bridewell-Birds, and that he should not hold Court there next Year; he had a Right to hinder it, for the Court was held in the Church, and he was Church-Warden.

Holt, C. J. It may be they have a Custom to punish by Information for reasonable cause, but it will be a great question, whether the cause here be such? And whether there may be a Custom to make Words more criminal than the Common Law makes them? And this is not like the Case of calling a Woman a Whore, which is punishable there; tho' not at Common Law; for that is grounded upon another Custom of punishing Fornication there, which is not punishable any where else; and he said, a contemptuous Carriage and Behaviour to a Magistrate, was a Breach of the Good Behaviour, and he to whom such Affront is offered, may bind him to his Good Behaviour; or, if he has no Sureties, commit him till he find some: So in this Court, if a Witness will be insolent, we may commit him for the immediate Contempt, or bind him to his Good Behaviour; but we can't indict him for it, and that is the course according to the Common Law of England: And a binding to Good Behaviour is not by way of punishment, but it is to shew that when one has broke the Good Behaviour, he is not to be any more trusted. Giving a Man the Lie in Westminster-Hall, or in any great Concourse of People, is a Breach of the Good Behaviour. At last the Court awarded a Procedendo as to the Assault, for they may have a Custom to punish by Information, such as assault the Magistrate. 1 Syd. 144.
Vide 1 Vent. 327.

Shirly and Right.

A Capias ad Satisfac. issued upon a Judgment after a Year and a Day, without a Sci. Fac. and the Sheriff executes it, and after suffers him to escape, and an Action for the escape; and if the Sheriff could take advantage of this in bar of the Action, was the question; and that he could not these Authorities were quoted, Mo. 274. 2 Saund. 100. Dyer 175. 21 H. 7. 16. Poph. 205. 3 Cro. 893. 1 Leon. 30. 3 Cro. 271, 288, 436. 2 Rol. Ab. 560. 21 Ed. 4. 23. 8 Co. 121. A Ca. Sa. after the Year and Day; and Execution and Escape.

Mountague offered a diversity, that where the Error appears on the face of the Writ it self, the Sheriff is not bound to execute it, and by consequence if he does execute it, he may let the Party go away again; as if a cap. ad Respondend. be taken out in Trinity-Term, returnable in Hillary, for it ought to be returnable the next Term, Vide 2 Keb. 261. 2 Rol. Rep. 442. 1 Rol. Abr. 484. Stil. 337.

Holt, C. J. In real Actions if there comes an Alias Summons, they give an intermediate Term before the Return of it, because of the Statute of Dies in Banco in Writ of Dower. Vide Statute of H. 8. for abridging Michaelmas-Term. But in personal Actions, where a cap. ad Respondend. does lie, it must be continued down from one Term to another, and if such Process issue out of this Court in Trinity-Term, returnable in Hillary-Term, the Cause is thereby out of Court, for if it be not continued in every Term it is gone; And if a Sheriff should take one by such Process, and let him go, he would not be liable, because the cause is out of Court; but here is an Execution returnable at a second Term, where is the mischief in this Case? For the Sheriff is to detain him in execution, and he has no opportunity at the Return of the Writ to discharge himself; the Sheriff is to keep him till the Court call for him at the Return of the Writ; and then a Habeas Corpus goes to bring him in, and he is delivered to the Prison of the Court, and if the Court think not convenient to have him the next Term, but will skip a Term, where is the harm of that? For let the Return be when it will, he is to be kept in Custody both before and after it: But upon a cap. ad Respond. it is otherwise, for there, by putting in Bail, the Process is determined, and by a long Return the Defendant is hindered from coming to make an End, and discharge himself of the Action. But it will not hold to say, that where the Sheriff is excused by the Process, there he shall be liable to an Action of Escape, for an Escape of one taken by Vertue of that Process; for if a Writ be tested out of Term, yet he may safely execute it, but the Plaintiff that sued it out, can't take advantage of such Writ: And this was Sir John Lenthall's Case: So he said in the principal Case, this at most was but an erroneous matter. And per Curiam, *Judicium pro Quer' Nisi.*

Libel was in the Spiritual-Court, for that J. S. being the Par-^{son} of such a Church, did make himself drunk at the Sa-^{crament}, and that he was a Whore-Master: And upon sug-^{gestion}, that they would proceed to a Depriuation, and that the Benefice was a Donative, a Prohibition was granted, quoad the suing in Order to depriue, but not quoad the other Matter.

George & Pierce.

In Order to a new Tryal, an Affidavit was read, that one ^{New Tryal.} of the Witnesses had declared that he had got a Guinea to stife the Truth. Gould, An Affidavit of him who had the Guinea were something, but his saying is nothing. A Witnesses laying a Wager in the cause is no hindrance to his being a Witness, for the other has an Interest in his Evidence, which he can't depriue him of.

Per Holt, If an Executor De son Tort deliver the Goods ^{Executor de} to the Administrator before Action brought, he may plead ^{son Tort.} plene Administravit: If Administration be first granted, and then another take the Goods, he is not thereby Executor De son Tort.

If one be brought up upon an Attachment, you can have ^{Interrogato-} no more than his Answer upon Interrogatories, and if he ^{ries.} forswear himself, he is subject to a Prosecution of Perjury: Vide Cro. Car. 89.

Per Holt, The Owners of the Gate-House Prison have no ^{Gate-House} Charter to sue a Commission of Goal-delivery, and it is ^{Goal-delivery.} hard to maintain a Right to a Goal without such a Liberty, and there is an Act of Parliament, that all Felons should be committed to the County-Goal; and the meaning of it is, if there be not a Franchise and Power to sue for Goal-delivery, and such Suit must be made in Chancery.

Dom-

Domina Regina & Mason.

Possession on
an Inquisition.
Record.

*Monstrance
de Droit.*

When a Man is put out of Possession by Vertue of an Inquisition retorn'd for the Queen, and another comes and pleads his Right, that is a distinct Record from the Inquisition; and so if another comes and pleads his Right, that is another distinct Record. And if Demurrer be to all, then it is determined there, or may be sent into this Court to be argued and determined; but if Issue be joined in it, then the way is to award a Ven. Fac. out of Chancery, retornable at a Day certain in the Queen's-Bench. And the Record is delivered hither per Manus of the Chancellor, &c. to be here at the Day of the Retorn of the Ven. Fac. but the Inquisition is never sent hither; but the Party comes in Chancery, and complains his being aggrieved by the Inquisition, and prays he may be admitted to shew his Right, and plead against the Inquisition, and that is a Monstrance de Droit; and all the Operation of the Inquisition is to make Title for the King, and the Party comes in as Plaintiff, and either traverses it, or shews his Right consistent with it. And if he will traverse it, he must shew Title in himself. The Case of Jefferson & Dawson was part on Demurrer and part on Issue, and if there be a Mispleader and a Repleader awarded, that must be in this Court; and where there is Issue and Demurrer, and the Party will not proceed on the Demurrer, the Court will give Judgment on the Demurrer; and tho' some Books have a saying, that a Record may be sent out of Chancery hither, even upon Demurrer, I would fain see where it has been done, per Holt.

Foster's Case.

Non Pros.

ONE took out a Writ, and the Defendant voluntarily appeared, and gave Notice to the Plaintiff's Attorney of Bail filed; the Plaintiff does not declare, Defendant signs a non Proseq. for want of a Declaration. Vide Statute 8 Eliz. and 13 Car. 2. And Holt held it well enough.

Gay & Cross.

The Plaintiff brought an Action on the Case for a false Return to a Mandamus to swear him Common Council-Man, for the Borough of Totness; which by Charter from Queen Elizabeth the manner of their Election was chalked out for them; and a Usage was given in Evidence to a Jury at the Bar, that the Election had gone quite contrary, which Usage was allowed to be good Evidence of a By-Law whereupon it was founded? So the Counsel on both sides consented to have it found specially, and to have it determined by the Court; whether such a By-Law and a long Usage pursuant to it, could alter the direction, or rather annihilate the direction of the Charter? And the Jury having given their Verdict in private over Night, said, that they had found the matter specially, and the next Day in Court delivered their Verdict for the Defendant generally, and would give no Reason for it, nor be moved to depart from it. And hereupon a new Tryal was moved for; and the Case of Wood and Gunston in Stiles, and a Case of the Welsh Drovers were quoted for new Trials, after a Trial at Bar. And tho' the Court were very much dissatisfied with the Jury, and Holt said, he never had known the like, and that he would have but little value for the Verdict of a Jury that would not at a Judge's desire declare the Reason which had induced them; and that as the Judges do publickly declare the Reasons of their Judgments, and thereby expose themselves to the Censures of all that be learned in the Law, and yet there is no Law obliges them to it, but it is for publick Satisfaction; so the Jury ought for the same Reason, to declare the Reason of their Verdict, when required by the Court. Notwithstanding all this, it being a Trial at Bar, the Court would not grant a new Trial.

Mandamus.

Corporation.

Verdict.

Trial at Bar.

Rice & Serjeant.

A Man has a Judgment for a just Debt against A. and takes out a Fi. Fac. and gets the Sher ff to seize the Goods, but would not let him proceed farther; but suffered the Goods to remain in the custody of A. the Debtor: B who has also a Judgment against A. for a just Debt, takes out a Fi. Fac. and the question was, whether he could seize upon the same Goods?

Fraud in the Execution.

Goods? And per Cur, he may; for the former was a fraudulent Execution, and the Sheriff might very well return nulla Bona upon the first Execution.

Smith & Villars.

Bail. Recognizance.

The Defendant pretending to be Earl of Buckingham, and being arrested by the Name of J. Villars Arm^d, upon Motion concerning Bail to be put in by him; the Court said, he might without prejudice put in Bail by the Name by which he was arrested; because being a civil Action, he need not join in the Recognizance, as the custom is in criminal causes. And that in the Case of the Earl of Banbury, who was indicted by the Name of George Knowles Esq; because by the course of the Court he ought to join in the Recognizance, and if he had entered into one by the Name of G. K. it would be an Estoppel upon him; therefore the Court indulged him to bring others who gave Bail for him, by the Name of G. K. Esq; for their Ad could not conclude him.

Domina Regina & Mayor, &c. Carlisle.

Attachment.

An Attachment granted against him for Proceeding after a Certiorari delivered.

Submission.

A Submission of a Matter to a Reference is no stay of Suit for that Matter, if it is not particularly so agreed on: Per Cur.

Copyhold.

A Copyhold Estate is not to be seized upon a Recognizance: Per Holt.

Date.

Per Holt, If a Deed has no Date, or an impossible Date, you may declare, that the Defendant by his Deed on such a Day and Year did so and so, and upon Oyer there will be no variance; but if you say that by his Deed of such a Date, or bearing Date so and so, and upon Oyer the Deed has no Date or an impossible one, it will be a Variance.

Tolt.

Note, It was strongly instanced by Lutwiche in the Common-Pleas, that a Tolt did not lie in a Personal Action; and the Court seemed to be of the same Opinion.

Holt,

Holt, It should be a Rule for the future that upon moving of Indiments here by Certiorari, we should not hear Motion in Arrest of Judgment, till the Defendant has appeared. *Certiorari.*

Queen & Blacket & Robinson.

Case was given to file an Information pro Malegestura against them, for procuring a Gentleman's Son to marry a Woman of infamous Reputation. *Information.*

Brooks & Stroud.

TWO were made Executors, and an Action brought by them; they set forth, that they were made Executors, and that they both did prove the Will, and by the Probate produced it appeared that one only proved it; and the matter being Pleaded in Abatement; Plaintiff has Judgment Ouster, and 21 H. 4. was quoted: Two were made Executors; one of them proved the Will, they both have the Right in them; and the other can't refuse till after the Death of him that proved, but then he may: If one of them is severed, the other shall go on. *Abatement. Resp. Ouster.*

Duke of Norfolk's Case.

Verdict was in Easter-Term, and before Judgment the Plaintiff dies: Per Holt, That shall not hinder the Judgment from being entered, provided, says the Statute, it be within two Terms after. And as to the Statute of Frauds and Perjuries, that only requires the Time of signing Judgment should be entered on the Roll, and that is only for the benefit of Purchasers; for if Judgment be signed in Vacation, yet it is entered as of the Term before; and none but a Purchaser shall be admitted to say, it was signed at any other Time; and it is the course of the Court to let all things be done in the Vacation, as of the Term before. *Death inter Verdict and Judgment.*

In Case of Tenants in Common, there must be an actual Ejectment Ouster of one by the other, or else he shall not be compelled to confess Lease, Entry, and Ouster: Per Holt. *Ejectment.*

In

Bail and
Sci. Fac.

In Sci. Fac. against Bail, the second must be tested on the Return of the first, and both can't be taken away at a Time; there ought to be 15 Days inclusive between the Teste of the first and Return of the second, per Eundem.

Information.
Gaming.

Information filed against one for drawing in several to play with him for Money, and putting false Dice upon them: Ex motione Salkeld.

Domina Regina & Templeman.

Plea Cul.
Evidence
non Cul.

After Pleading guilty to an Indictment, you may give any thing in Evidence that justifies the Fact, or proves him not guilty of the Fact; for the Entry is non vult contendere cum Domina Regina, sed pon. se in gratiam Cur. And it is not like the Case where one is found guilty by Verdict.

Smith & Angel.

Debt by Ex-
ecutors *vers.*
the Heir
who pleads
rien per Dis-
cent nisi a
Reversion,
&c. specially.
Replication
and Rejoin-
der.

Judgment
pro Quer
generally.

DEBT by Plaintiff and his Wife as Executors of M. F. against Defendant as Son and Heir of J. A. upon several obligations by which the Father did bind himself and his Heirs, upon several conditions, &c. Defendant confesses the Action, and that the Bonds are the Deeds of his Ancestors; but says that his Father was seized in Fee of four Parts in six of such a Close, and of three Parts in four of another Close; and of three Parts in four of a Messuage, and Issues and profits thereof: That the said Obligor in his Lifetime by his Indenture bearing Date, &c. a counter-part whereof he produced in Court, did demise the said Parts and Shares to H. G. for 500 Years; by Vertue whereof he entered, and was possessed for the Term aforesaid; that the Father died seized of the Reversion which descended to the Defendant; that he was thereof seized, and that at the Time of exhibiting the Bill, or at any Time since, he had not any Land or Tenements by hereditary Descent, besides the Reversion of the Tenements aforesaid; that after the Death of his Father, and the said Descent 9 W. 3. there was a Suit in Chancery between Edward A. C. J. B. and Elizabeth Wife of the Defendant's Father, and the Defendant, in which Suit it was decreed and adjudged in the said Court, that

that Elizabeth should have one third Part of the Premises for her Life for her Dower, by Vertue whereof the said Elizabeth was seized of a third Part of the Premises for her Life, and so prays Judgment; whether he, as Son and Heir to his Father, ought to be charged beside the Reversion of the Term aforesaid; and of the third Part whereof the Wife was endowed when it should fall? The Plaintiff craves Oyer of the Lease; by which it appeared, that in consideration of 300 l. he had demised the Premises for 500 Years, provided that if the Father, or his Executors or Administrators, paid 50 l. per Annum to H. G. during his Life, then the Estate should cease. Plaintiff replies, that the Defendant after the Death of his Father entered, and was thereof seized, and took the profits, besides the third Part to his Wife, which would be sufficient to pay the 50 l. a Year, and so prays Judgment; Defendant rejoins and says, he did not enter modo & Forma, and concludes to the Country: And Plaintiff demurs.

Holt delivered the Opinion of the Court after several Arguments at the Bar, and said, It was not doubted, but that the Plaintiff ought to have Judgment, but the question was what Judgment we ought to give him; whether a special one, to have Execution of the Lands and Tenements mentioned in the Plea, or generally against him as Heir to his Ancestor? We have considered both; and we are of Opinion, there ought to be general Judgment against the Defendant, by which his Body, his Goods, his Lands, which are not Assets, may be taken in Execution. *Opinio Curie.*

Two things are considerable herein,

1. The Pleading of a Reversion of a Term for Years made by his Ancestors; whether Pleading a Lease for Years, be good and allowable in a Defendant sued as Heir to his Ancestors? Whether that be sufficient to hinder the Plaintiff from immediate Execution.

2. If Pleading of an Assignment of Dower to the Wife, and that he had a Reversion expectant thereupon by Court of Chancery, be good?

As to the first, the Case is this: A Man by Bond obliges himself and his Heirs to pay so much Money, then makes a Lease for Years and dies, whereby the Reversion in Fee descends to his Heir; the question is, Whether the Heir may
L
Plead
1st Point.

plead this Lease for Years in bar of Execution, or confess Assets; without taking Notice of the Term for Years? There are indeed some few Precedents, and I have known it practised where it was pleaded: but I am not willing to deliver my Opinion as to that Point now, because the case does not require it; but it seems to me, as it should not be matter lying in the Mouth of the Defendant to plead any such matter; for he might without danger confess, that he had Assets, without taking any Notice of the Lease. Note, What makes compleat Assets? To have the Freehold and Inheritance of the Estate descend to him, and that he has from his Ancestors; therefore he has compleat Assets. If it were a Lease for Life, made by the Ancestor, and only a Reversion in Fee expectant thereupon had descended from the Ancestor, that would not be Assets in Possession; but a Reversion in Fee expectant, upon an Estate for Life; and there he had not a Freehold, as here he had, but a Reversion expectant upon a Freehold; besides it appears by the Statute of Gloucester, and of 21 H. 8. That the Common-Law, did not much regard Estates for Years, for such Estate was subject altogether to the Will of him in Reversion: For if he in Reversion, had suffered a recovery by collusion or default, the Term was bound by it; and his Term was lost without remedy, as appears by the Comment of my Lord Coke, upon that Statute. 2 Inst. 321. 1 Inst. 46. And after the Statute of Gloucester, which gave Term for Years liberty to come and falsify a recovery had against Tenant in Reversion. Again, Leases for Years becoming more considerable, and yet more precarious, because of the frequency of common recoveries, which now became a common Conveyance, the Statute of 21 H. 8. became a further remedy for Terms; yet notwithstanding these Statutes, it never lay in the Mouth of a Tenant to a Precipe to plead a Lease for years, or to stop Execution upon any such Plea. If an Assize be brought against Tenant for Life, he can't say there is a Lease for years precedent to his Right, tho' Tenant for years himself may falsify a recovery against him in Reversion, so the same reason holds in this Case: For the obligation of the Father Attaches upon the Land, being Assets in the Heirs hands, as Brown Assets 9. Sci. Fac. grounded upon a Fine to Execute a Fine, whereby Lands were conveyed by grant and render to one and his Heirs in Tail; Tenant pleaded a Warranty of the Ancestors of the Plaintiff, and that Assets descended to him, Plaintiff replied that the Assets that did descend were Extended for the King's Debt, and it was not held a good Plea, because the Freehold and Inheritance did descend; and they

they were present Assets, if it be so in case of a real Lien so as to bind the Land, in Case of Warranty, sure the same reason where the Heir is charged upon Account of Assets, in an Action of Debt upon the Lien of the Ancestor, the Books say he might Plead a Lease for Years as to the value of the Assets, for Assets in real Action is no more than Assets are worth; so that if Plaintiff is not to have it discharged of the Term for years, the Reversion is less worth; then if it be a good Plea, the consequence is that an immediate extend. Fac. do go to appraise the Reversion upon Inquisition taken, and then to deliver it to the Plaintiff to Enter into it; when it falls in Possession, as in Dyer 246. Debt against an Heir who pleaded he had nothing but a Reversion expectant upon an Estate for Life, Plaintiff joins with him and takes Judgment upon the confession; and to have Execution when Reversion falls in Possession; so if this be a good Plea, the same must be done here. Hern's Pl. 307. is a Precedent of this matter. There is no mischief to him in Remainder, nor to the Lessee, for he will defend his Possession in Ejectment, by virtue of his Lease: But we don't give any conclusive Opinion in this Matter.

2d Point. The Dower to the Wife is ill pleaded, for it is 2d Point. not said that the Wife was Endowed by metes and bounds, nor that the Lord Chancellor did Endow her; but that there was a Decree in Chancery, by virtue whereof she was Endowed; and that is not to be understood, for the Chancellor has nothing to do in Assigning of Dower, but in Case of Lands holden of the King in Chivalry, and the Heirs being in Wardship to the King; and in such Case, when she came in as his Wife, and prayed to be Endowed, for the King's Title appearing on Record, a Record was necessary to find her Title; and so an Inquisition was taken, and upon her being found thereby to be his Wife, the Chancellor used to Assign her Dower, or to award a Commission for it. F. N. B. 363. And this was the Legal way for the Wife to Recover her Dower of Lands in the King's hands, by the reason of the Wardship of the Heir; for as every Guardian might Assign Dower in Pais, so the Dower in Chancery, is by the King himself, in a Judicial and proper manner; but for Chancery to decree that the Wife should have such a third Part, would not vest a Legal Interest in her, the Heir may do it in pursuance to a decree; and when he does, the Wife is in by virtue of the Assignment of the Heir, and not by virtue of any decree. Then if the decree be not a Title vested, he has confessed Assets, for he set forth only a Reversion depending upon

a Freehold, and does not shew there was a freehold; and if the Assignment of Dower were good, pro Tanto, yet here is two Thirds whereof she was not endowed, and that is only charged with an Estate for Years; and that is enough to charge him with a general Judgment. Plowd. 420. comes home very near to this Case in every respect. It is Debt against an Heir if he plead any Plea, that is not a sufficient Bar, if he suffer Judgment to go against him by nihil Dicit, or confession, it shall be a general Judgment; because there is no way for the Heir to defend himself, but by setting forth the Truth, what Assets he has, where they lie, and so open the Truth of the Case to the Plaintiff; and let him take what Benefit he can of it, and if he does not do this there ought to be a general Judgment against him, as well as upon demurrer. This Authority was murmured at, but there is not a Word of it but what is good Law, Vide Mod. 520. 3 Cro. 639. the same Case. If the Heir will confess that he has Assets by descent, in such and such places, besides which he has no more, and the Issue is that he has more, tho' he confesses enough; yet if more Assets be found, there shall be a general Judgment. 2 Leon. Vent. 11.

Judgment. In this Case, it is not in the Power of the Court to give special Judgment, if the Plaintiff does not desire it, for it would be Erroneous. 2 Rol. Abridg. 71. If it be by consent of the Plaintiff, they may give a special Judgment: But how can we do so here? if it be upon the confession, we must allow the Plea good, that is, that 'tis a Reversion expectant upon an Estate for Life, when it does appear that it is not so. If he had pleaded that he had only a Reversion expectant upon an Estate for Life, and the Plaintiff had replied that the Tenant was Dead or had surrendered, and it is so found by Verdict; sure there must be a general Judgment, because he has pleaded a false Plea in Bar of the Plaintiffs Execution; and it appearing to us, that there never was such an Estate for Life in being, it is of the same Effect as if a Verdict had so found it. Let the Plaintiff have a general Judgment.

Process of
Hundred-
Court.

Per Holt, Lev. Fac. is not the proper Process of a Hundred-Court, but it is a Distringas, but Levary may be by custom, Vide ante Fol. 1.

Reddidit se.

Upon bringing the Bail-piece to Mr. Clark, and giving him satisfaction that the Principal rendered himself before, or upon the Return of the second Sci. Fac. he will give you a discharge or Superseas of the Sci. Fac. per Holt. Domi-

Domina Regina & Ogden.

AN Order affirmed at the Quarter Sessions of the Peace Highway.
for the County of Dorset, it was an Order of two Justices of the Peace of the said County, founded upon a clause in the Act of Parliament, in the 8 W. 3. for enlarging the Common Highways, Vide the clause: There was an Ad quod Dampnum sued out, and an Ad nullius Dampnum returned; and an Order thereupon made for the inclosing such an Ancient Highway, and setting out a place for another in such a place; and an Appeal from this Order to the Sessions, and there the inclosure is declared, to be a great Nuisance to the whole Country, several exceptions were taken to the Order of the Justices at the Quarter Sessions.

Ad quod Dampnum.

Order of Sessions.

1. That it did not Appear to have been at the next Quarter Sessions after the Order made. Exceptions.

2. An exception was taken to the whole Purport of the Order; that it did not Appear by it, what the Way to be inclosed was, or what the new Way, without which there was no certainty; what the Subject matter of the Appeal was; for this being a Method that the Statute has Ordained for the Determination, and making a Final end of the matter: Sure then that Thing whereof a Final end is made, ought to Appear very certain.

It is fit to consider the very Statute, what Alterations are made by it, and what not.

1. It is to be known that this Clause does not alter at all the nature of the Writ, of Ad quod Dampnum; but that Writ is the same as it was before, and to be proceeded on, as if this Statute had not been made; there are not any words in the Statute, that do alter the nature of the Writ, nor the method of Proceeding thereupon, tho' there be something added.

2. This Writ after it is Executed, is to be returned into the Court of Chancery; and in that Case the Sheriff having taken an Inquisition, makes a Return thereof indilate; so are the Words of the Writ, so that now the Writ is returnable

D

into Chancery; and for this Reason it is, that if the Queen see thereby, that there is no harm to Enclose; that she may grant Leave to do it, and in Order to that the Inquisition must find that it is Ad Dampnum nullius, and there can be no Foundation of inclosing without such a Return.

3. Without Licence or grant to Inclose the old way, tho' the Inquisition find that such Inclosure would redound to the Damage of none, and it be so returned; yet none could lawfully Inclose, or if he did he would be guilty of a Nuisance? For it is not the Inquisition and Return, that gave any Authority to inclose, but the Licence of the Crown grounded thereupon: And when there was such an Inquisition, Return, and Licence, without any traverse of the Inquisition; upon Inclosure made, there was an alteration made of the Way; and the old Way ceased to be a Way, and the new one set out, became the common Highway.

It would be a strange construction upon that Clause of the Statute, that a Man should have a Right to Inclose without a Licence, to make so great an alteration; as to make the finding of an Inquisition, tantamount to a Royal Licence: For tho' the Inquisition does not find it to the Damage of any Person; yet it is in the Election of the King or Queen, to let the old one stand or not. And there is nothing in this Act to induce us, to make so great a Leap, as that is.

Suppose, an Inquisition be taken, and returned into Chancery, that would be a foundation for a Licence; for the words of a Writ are, what harm would it be to us, or to any of our subjects, that such a Way, describing it in certainty, should be inclosed; and a new one describing in the same manner set out: But you will say that the Ad quod Damnum, is now under the consuance of the Justice of Peace, and an Appeal thereupon given to the Sessions; how can it then, go into Chancery? Very well, if the Sheriff, after Inquisition taken, does get it enrolled as the Statute requires; returns it into Chancery, as he is bound to do by the command of the Writ: And all that the Statute requires is, that the Inquisition be enrolled, at the next Quarter Sessions; and if it be, and no Appeal from it, or if there be an Appeal and a Judgment thereupon, for the Inquisition, the Traverse is thereby taken away: And it is a good Plea to a traverse, that the Inquisition was enrolled, and no Ap-

Appeal, or that an Appeal was brought: And the Judgment for the Inquisition.

It may be asked, when the Appeal is to be brought, the words of the Statute are express, that it be at the next Sessions after the Inquisition found; but they say farther, that it is to be by the Person grieved by the inclosure; so that you must take both the Words together, that is, it must be at the next Sessions after the Inquisition taken, and the Inclosure for it can't be sooner; for till Inclosure there is no grievance: And it must be somebody aggrieved by the Inclosure. Here is indeed an Inclosure; but it is not an Inclosure by virtue of the Inquisition, according to the Ad quod Damnum, for it is without Licence; and not by the Authority of the Act of Parliament; and therefore not such, as does Inquisition oblige the Party to Appeal. Therefore per Totam Cur. the Inquisition was quashed. quashed.

Per Cur. & omnes Clericos, It is irregular to sign a Judgment, without serving a Rule to bring in a Record. And a Judgment was set aside for want of it. Signing Judgment.

No Man tho' by consent of Parties can be Attorney of Attorneys. both sides, per Cur.

Court many Times, will fix the transitory Action, where the Defendant has not had probability of an indifferent Trial. Transitory Action.

Domina Regina & Clerk.

PER Cur, An Information tried at the Bar is not within the late Statute of giving costs against the Prosecutor; for that says, the Party shall enter into a Recognizance of 20 l. And that Party shall have a Sci. Fac. thereupon, but 20 l. would be too small costs, in the Case of a Trial at Bar. Information on Costs.

Per Holt, If a Judge who tried a Cause, be since put out; upon a Motion made for a new Trial, he may certify the Court; what his Opinion was, when he tried the Cause. Judges certify.

Term.

Term. S. Michaelis,

Anno 1 Annæ.

1

Elvis & Mercato.

Attorney.

Attachment.

In a Motion to put off a Trial, the Attorney made an offer *Die Lunæ*, to bring money into Court, and a Rule thereupon, that the other side should shew Cause; why the Trial should not be put off on those Terms, at which Day the other side consented; so the Rule was drawn *Ex consensu*, and the Trial put off: And now the Money not having been brought into Court; an Attachment was granted against the Attorney, tho' it was objected by Mountague, That tho' the Attorney had made such a Proposal, yet he had not consented the second Day. But per Cur,

1. He shall not Aver against the Rule, which says it was by consent.

2. We will not have our Attorneys Trifle with us, and make a Proposal to Day, and fly from it to Morrow.

Read & Tregeagle.

Judgment
and Execu-
tion.

R. gave a Bond and Judgment to T. defeasanced upon payment of Money on such a Day certain; and it was agreed by the same Deed between the Parties, that T. should not sue any Execution against R. before the 16th of July, the 15th of June T. sues out a *Fi. Fac.* delivers it to the Sheriff, before the 16th of July, and gets it executed on the 16th of July, upon Demand and Nonpayment. And Broderick moved to set it aside, for that the Plaintiff by breaking his Agreement, had in-

incapacitated the Defendant to perform; for by the delivery of the Writ to the Sheriff, the property of them was bound; so that he could not sell any of them, to raise the Money.

But per Cur. Since it is for a just Debt, and Judgment executed, we will not now undo any thing; for perhaps, that would be a means to frustrate the Judgment: And besides, you have no Oath, that any Purchaser was deterred, by Reason of taking out and delivering the Writ; and here R. had a good Remedy, by Action of Covenant.

And my Lord C. J. remembered the like Case; where Covenant was brought, and Damages thereupon recovered: And they all said the Rule was, where a mischief was on either side, and a Remedy on the one, and none on the other, they would suffer that to continue, against which there was a Remedy.

And Holt said, An Audita querela would not lie in this Case; because that would pull up all by the Roots, and avoid the whole Judgment.

After Writ of Error sued out, if a Sci. Fac. be brought Error. against the Plaintiff in Error, to shew Cause why there should not be Execution on the Judgment; the end of it is, to compel the Plaintiff to assign Errors, Execution ought not in strictness to be taken out, till non Pros' entered.

Assumpsit by Administrator, for Goods sold and delivered by his Intestate, and a Promise likewise to him. Defendant pleads non Assumpsit infra sex annos to the Plaintiff; Plaintiff replies a promise to the Intestate within six Years, and Issues thereupon, and Verdict for Plaintiff. And this being moved in Arrest of Judgment; and appearing thus upon the Record of nisi prius; Per Cur. If the Paper-Book, or Copy of the Issue was right, we will amend it; and made a question, whether it be not within the Statute of Oxford? Amend-ment.

Holt, Confession is the worst sort of Evidence that is, if there be no Proof of a Translation or dealing, or at least a probability of dealing between them; as here there was, the one being a Sailor, and the other a Captain of a Ship. Evidence.

Withers & Harris.

Execution.

HOLT, If one will take out Execution within a Year after Judgment, he may continue it down after the Year by Vicecomes non misit breve, without being put to a Sci' fac'. And he said, he had known it adjudg'd on Debate, there was no need of a Sci' fac' to have Execution in Ejectment after the Year and a Day: But he said he never could agree with that Opinion, nor see any Reason for it. For in all real Actions, as upon Fine Sur concessit, there must be a Sci' fac' after the Year; and all the Court were of the same Opinion: But it was refer'd to the Master to examine, Whether it was after the Year or not, or whether there had been a Vicecomes non misit breve, of any Execution taken out within the Year: And it appearing on Examination to be after a Year and a Day, no Process taken out within the Year, held, it could not be the Process in Ejectment; for Execution is an habere fac' possessionem for the Term, and a Fi' fa' for Damages.

And Process
thereon in
Ejectment.

Attorney.

Per eundem, You can't change your Attorney without Leave of Court, to be obtained on Motion, though he be ever so great a Cheat.

Wood & Sutton, Marshal of the Court.

Bail.

Judgment was against him in Debt for an Escape; and he brought Writ of Error, and put in sham Bail, and so on, toties quoties, they were excepted against. Upon Affidavit of this, a Rule was made peremptorily for his putting in good Bail on such a Day, or else Execution to go.

Issue.

When there is a Special Issue tendered, and the other Side joins in it, the Book is sent back to the Defendant's Attorney; and he has four Days given him, either to join in the Issue or to waive it, and give the General one; and after the four Days, he ought to send the Paper back without any demand of the Attorney of the other Side; and if he fails in it, the other may sign Judgment for want of joining in Issue: But if the Attorney will take back the Book after the four Days, and receives Money for entering the Issue

Issue or making up the Record, he shall not after enter his Judgment. Per Cur' & Clericos.

A Plea in Abatement was overul'd, and a Respondeas Ouster awarded, and the General Issue pleaded. It was a Question, If the Defendant's Attorney should deliver a Copy of the Issue, Declaration, and the Record of the Plea in Abatement to the Plaintiff's Attorney and pay for it? And the printed Rule of the Court was read, and the Court would consider of it, though the constant Practice were agreed to be, that the Defendant's Attorney should do it. And it was made a Rule, That it suffice for the future, after Plea in Abatement overul'd and General Issue pleaded, for the Defendant's Attorney to deliver a Copy of the Declaration and Issue, without any Copy of the Plea in Abatement. Note, It is a constant Practice for a Plaintiff to sign Judgment by Default, for want of a Copy of the Issue and paying for it, and so execute a Writ of Enquiry.

Abatement.

Copy of the Issue.

— & Tempest.

DE B C upon a Bond, a special Non est factum pleaded, with a Conclusion of Et hoc parat' est verificare; besides the Plea refer'd to a Condition in the Bond without any Oyer had of it, and a Demurrer for both Causes. As to the first, it was said, It was either way, videl't, to aver or to conclude to the Country. And Keb. 3. fol. 132. Hill. 25 Car. 2. was quoted. And the Case of Day & Roberts in this Court in the Year 93. to which Opinion Holt inclin'd, as if in Bar to a Debt upon a Bond, one should say, That he delivered it as an Escrow, to be deliver'd over as his Deed upon such a Thing to be done; which being not done, the Plaintiff got the Deed, Et sic non est factum, Et hoc parat' est, &c. and leave the Plaintiff to tender Issue in the Repliation. As to the other it seemed a fatal Exception. Plaintiff had Judgment.

Non est factum specially pleaded.

Demurrer.

Judgment.

Scir' fac' against Bail who had rendered their Principal before a Judge, but he immediately escaped, and they moved to file the Bail-piece, in Order to plead a Render of Principal. Per Cur. We can't deny Leave to file the Bail-piece, for without it they may plead Nul tiel Record' to the Sci' fac'; for one can't proceed upon the Sci' fac' without Bail-piece be filed. Per

Bail.

Execution
by Tipstaff.

Per Holt, If we see one against whom there is a Judgment of this Court, walk in Westminster-hall, we may send our Officer to take him up if the Plaintiff desire it, without a Writ of Execution.

Falſe Impri-
ſonment.

Per Holt, If one be arreſted after the Return of a Writ, falſe Impriſonment lies againſt him that does ſo arreſt him. Here complaint was made to the Court, That one was arreſted in Trinity-Term, by Vertue of a Writ returnable in Eaſter-Term, and a Bail-Bond taken for Appearance at the Time of the Return of the Writ.

Per Cur', There is good Matter to plead againſt an Action upon the Statute of 23 H. 6. And though Bond be ante-dated, yet it may well be done with a primo Deliberat' at the true Time; and the Faſt was refer'd to the Maſter to examine, in order to puniſh the Officer for Oppreſſion.

Fuller's Caſe.

Execution.

Prisoner.

HE being committed to the Queen's-Bench for a Fine to the Queen, and charged in Execution at the Suit of ſeveral others, the Maſter had a Jealouſy of him and put Irons upon him; upon which he writ a Letter to the Attorney-General craving his Help; which being communicated to the Court, They ordered the Maſter to keep him according to Law, declaring, That if he died through cruel Uſage, it would be Murder in the Jailor: But ſaying alſo, He might juſtify putting him in Irons if he fear'd an Escape, or if he were otherwiſe unruly.

Domina Regina & Buckbridge.

Indictment
quash'd.

Indictment againſt him, for that he was Communis pocus-lator, Anglice, a common Drunkard, and Communis profanus Jurator & perturbator pacis & aſſiduus Domorum tipplariarum frequentator, Anglice, a frequenter of Tippling Houſes, and quash'd; for that the Charge was too general and looſe.

Feme-

Feme-Sole having a Warrant of Attorney to enter Judgment unto her, and married before it was enter'd; King moved, That it might be enter'd, and the Judgment should be to the Husband and Wife; and he took a Difference between such a Warrant made by a Feme-Sole, and one made to her; for a Marriage in the first Place would be a countermand of the Warrant, as being to the Disadvantage of the Husband. And for this he quoted a Case in point, Pasch. 9. W. 3. where leave was denied to enter against Husband and Wife, upon a Warrant by the Wife before Marriage; and compared it to the Case of a Grant of a Reversion by a Feme-Sole, who marries another before Attornment, the Grant is countermanded: But if she had granted it to A. and before Attornment had married him, an Attornment after were good, 1 Inst. 310. 4 Co. 61. a. and to this the Court inclined. But upon reading of the Warrant, it appeared to be to enter Judgment as of such a Term which was now past.

Warrant of
Attorney,
Baron and
Feme.

Watts & Rosewell.

THE Case being again moved, and 1 Vent. 210. quoted as an Authority in point, That the Conclusion was bad; for that by the general Conclusion he had waved the special Matter of the Plea: For it is a Rule in Pleading, That when a Man pleads special Matter and concludes generally, he thereby waves the special Matter. And it was agreed on both Sides, That here he might have pleaded general. V. 1 Vent. 210. Keb. 140. was quoted contra. But there being no Judgment in Keb. the Plaintiff had Judgment nisi. Absente Holt.

Conclusion
of the Plea.

If a Judge at a Trial does erroneously over-rule a Matter offered in Evidence, the regular Way is to tender a Bill of Exception; yet if upon such a Matter, the Party will suffer the Trial to go against him, it is good Cause of a new Trial. Per Cur.

Bill of Ex-
ceptions.

New Trial.

Hyon & Ballard.

PROCEEDINGS on Bail-Bond for want of Bail above; upon Motion to stay Proceedings, Defendant produced a Release under Seal of the Plaintiff, and thereupon the Plaintiff's Attorney suspecting it, consented to deliver a Declaration forthwith, and that the Defendant should plead the Release, and so try it; which being done, the Plaintiff was nonsuited at the Trial; but after, it being discovered to be a notorious Forgery, a Motion was made for a new Trial: But the Court said, They could make no Rule in the Case, the Plaintiff being out of Court upon the Nonsuit; but since the Rule to stay Proceedings upon the Bail-Bond was not absolute, but till the Court should farther direct, That, said the Court, was still before them; and therefore, let the Rule be, That they shew Cause why Proceedings should not go on. Quod Nota.

*Domina Regina & I. hab' de Paroch. de Caple in Surrey.*Order for
Removal
quash'd.

OR D E R of two Justices was to move a Man and his two Children out of the Parish of C. where he might become chargeable, he having not rented a Tenement of 10 l. a Year. Held, That saying they might become chargeable, was not well; but it should be, That they were likely to become chargeable: But it was held, That saying they had not rented a Tenement of 10 l. a Year did suffice. It was held bad as to the Children, for they are only removeable as Persons not settled and likely to become chargeable, or so young as they are not able to provide for themselves: And it was quash'd as to the Children.

*Domina Regina & Sir John Bucknell.*Indictment
for not re-
pairing
Bridges.

INDICTMENT was against him for not repairing of a certain Bridge, &c. which he was bound to repair, Eo quod he was Dominus Manerii de la More. And it being moved hither after Conviction, it was moved by Broderick, That there were but three Ways that a Man could be liable to such a Charge, by his Deed, by Prescription, or ratione tenuræ; that

that this here could be none of them; ergo bad. v. Stil. 400.
Latch 106. Noy. 93.

Holt, A Man is not bound to repair a Bridge, because he has a Manor, or is Lord of a Manor.

But it must be said, That this is some Charge upon the Manor that can oblige the Man to repair, and that only can be one of these two Ways:

1. That he held the Manor by the Service of repairing the Bridge, &c. that is, *ratione tenuræ*; and this being a Charge upon the Possession, is like any other Service for which the Tenant in Possession is chargeable. Every Tenant in Possession, be he but Tenant for Years or at Will, is bound to repair; and immediately upon Default of Repair, he is indictable.

2. The other way of Charge is by Prescription, and then it must be the Certenant; and all those whose Estate he has, did use and were bound to repair; and here you neither shew Tenure or Prescription. But as to charge to repair a Bridge, it will be well to say, that *omnes occupat*. But where one goes to charge the Estate of another with any Thing for his own Benefit, he must either say, That he and all those whose Estate, &c. or at least *omnes terr' Tenentes*: And here Judgment was said *per Cur*.

Domina Regina & Harris.

A Order of Justices for discharging an Apprentice upon the Statute of 5 Eliz. was quash'd, it being not signed by them as that Statute requires. And Cheshire said, That one Piece of Wax could be the several Seal of several People, putting their Seals severally to it. Apprentice:
Order
quash'd.

Post Denning & Close.

A Complaint was levied in an inferior Court before the Debt contracted, and an Arrest upon a Process upon the Complaint adjudged ill: *Per Cur*. Arrest: Infe-
rior Court.

Writ of Enquiry set aside daily for excessive Damages. Writ of En-
quiry.

Lucy

Lucy & Bishop of St. David's.

See 1. L. Kaym. 447. 539. another branch of the same case.

Excom. cap.
Retorn.

Plea thereto.

Significavit.

HE was taken up by an Excommunicato cap. and in the Gaol of Newgate; and the Writ being not yet returnable, he removed himself up by Habeas corpus: And per Cur, he has no Day in Court, till the Writ of Excommunicat. cap. be actually returned, for the command of the Writ was, to take and keep him; and to return the Writ, how he had executed it: But upon such Return likewise the Party has no day in Court, but must bring himself in by Habeas corpus. And before he can plead to the Writ, it must be returned here on Record, for the Writ is to be adjudged good or quash'd; as it is good or bad upon their Plea, and the enrolling of the Writ on the Record, at its Issuing out, is not enough to give day in Court, or to appear to, and plead. And the Counsel of the other side insisted on it; and obtained leave to examine the Hab. corp. which did recite the Writ of cap. with the Writ: And here it was complained of, that a double Writ of Excom. cap. was taken out with a double Return, to the end if he were taken by one and discharged, he might be taken up again by the other, and so vexed; which Practice the Court did very much disapprove of, tho' it was agreed, there might be two if there were two Excommunications for the same Cause: So he was remanded. But being brought up again at the Day on which the Writ was returnable; and the Writ being then returned, he offered a Plea in Parchment, which reciting the several Writs of Excom. cap. by which he had been taken up and detained; one upon a significavit of Excommunication for not paying costs, upon a Sentence against him before the Archbishop upon his Ordinary Jurisdiction and the other upon a significavit; upon a Sentence on an Appeal of the former Sentence before the Delegates: And his Plea was, that he was made Bishop of St. David's, and called to Parliament by Writ at such a Time, after that he sat in Parliament as a Peer; and so concluded in Abatement, because a cap. did not lie against a Peer.

Note, -He further set forth in his Plea, that he was brought up to this Court by Hab. corp. and turned over to the Custody of the Marshal, and then pleaded; but the Truth being otherwise, the Court made him strike that part out of his Plea; for the filing of an Habeas corp. here did not make him

him a Prisoner to the Marshal; for the Court notwithstanding, may remand him to Newgate. Another Matter in their Plea was: It begun with a pet' Judicium de Brevi pred', concluding with unde pet' Judicium, &c. But the Court held that well, the Plea having begun right.

Note, The Question intended was, If a Peer should be ex-communicated and continue so 40 Days, what Remedy shall there be against him? And it was said, there was none but that of being expelled the Pales of the Church; and the Communion of the Faithful: But Powell said, he knew no Law but a Cap. Excom. lay against a Bishop, or other Lord: But Holt, The Question is not before us; and therefore let us not meddle with it: And he said, he did not believe they were in earnest with their Plea. Question.

But it was excepted to the significavit as recited in their Plea, and so was the Writ of Excom. cap. too, that he was condemned in Costs, in quodam Negotio Officii sine correctionis, which was said to be ill for incertainty; for it was said, the Writ of Excom. cap. ought to recite the significavit right, that the Court might know, what Process to award upon the Statute of 5 Eliz. which in all Cases of Excommunication, orders the Writ to be sent into this Court, and entered on the Roll here; and then delivered to the Sheriff; and in case he be not taken thereupon, to issue another cap. and this in all Cases, except the nine mentioned in the Statute; but if it be for any of the nine mentioned in the Statute; then upon a non est inventus returned, to issue a new Process with Proclamation and Penalty. So that the Court can't here tell what Process to issue, without the Cause be certainly mentioned in the significavit, recited in the Excom. cap. that is, whether it be one of the nine Causes or not: And they can't judge on the Original significavit, for that is not here but in Chancery; and Chancery can't relieve them thereupon, because they are not to make the Process upon it; but this Court is. But before the said Statute, if the significavit had not certainly mentioned the Cause, it was sufficient. Significavit.
Exceptions.

And Holt put the Case of Fowler a Quaker, in this Court, some Years before he was Excommunicated, pro subtractione decimarum sine alior. Jurium Ecclesiasticor. which likewise was judged uncertain: And there, upon consideration,

it was resolved, that before that Statute of the 5th of the Queen, the Cause need not be mentioned in the Writ of Excom. cap. For there if the significavit was not good, they applied to Chancery, where the Writ is returnable; and there it was quashed. But the Statute of 5 El. has made great Alterations; which Statute orders, that the Writ be brought into this Court; and enrolled here before it was delivered to the Sheriff; so the Power that was in Chancery before the Statute, is now taken from it, and given to this Court; for if the Writ be returned non est Inventus, the Alias cap. shall go out of this Court; if it be one of the nine Causes, says the Statute, there, upon Return of non est Inventus, there must be Process, with Proclamation and Penalty; so there must be an Alias cap. if it be not one of the nine Causes, and if it be, there must be an Alias Process, with further Proclamation and Penalty; and this must now be the right way by necessary consequence of Law: For if the significavit be in Chancery and bad, there can be no Remedy there, for the Writ is here, and the Process is to be made here; and they can't supersede a Writ returnable here, especially after the Court here is possessed of it. Then if the Writ be there, how can we give Remedy according to the Statute, if we do not know what the Cause of Excommunication is? And how can we know that otherwise, but by the Writ reciting the significavit? for we can't know by the Writ in Chancery, which we have not; and it ought to appear to us to be a Cause of Ecclesiastical Contumace, as it ought to be: And he quoted Trollop's Case. In the Case of Fowler, the Writ was quashed and he discharged; but that can't be done till the Writ be returned, for it can't be done on the Entry made on the Roll, at the issuing of it out. And the Case of King and Hill, Trin. 12 W. 3. was, in quodam Negotio concernen. Eruditionem sive instructionem liberorum, and it was quashed for uncertainty. And whereas in this Case, Powell objected the Case in Cro. Car. 196. for there the Writ only said, for Non-payment of costs, and held well enough.

Holt said, That he had upon the Debate and consideration of the former cases, viewed many Precedents; some immediately after the Statute was made, and all of them mentioning the Cause in certainty; and besides the Reason of the Thing made it absolutely necessary; for to what purpose should the Statute enable us to issue Process, and to vary our Process, according to the Nature of the Offence,

if we have no means to know the Offence? And he said the Writ in the Register, was quite altered by the Statute, and the Writ is only pro contumacia: And he said further, We are not to issue Process here, as instruments or Conduits, but Judicially as Judges: And it will not be an objection to say, that we may award Process at all hazards, and let the Party grieved come after and plead to it; for we shall never grant an ill Writ, that the Party may avoid it in pleading. And as to the Plea of Peerage, he said it was a foolish one; and the Writ and his sitting in Parliament signified nothing; for he was a Peer by being created Bishop, and the Writ and his sitting in the House, added nothing to it. And Day being given to the Queen's Counsel, till Thursday following, to answer the Pleas, and object; the Bishop's Counsel moved to have him bailed. and quoted Latch. 174, 204. Mo. 406. Cro. Car. 501. where one was bailed after Plea pleaded; but the Court refused to bail him. And Powell said, It would be of ill consequence to bail him, or if they should judge the Writ good, then they would bail a Man, not bailable by Law; and he was remanded to Gaol. And being brought up again, he insisted on his Plea; not waiving however his exception to the Writ. And now Broderick moved, that he ought not to be admitted to plead, by which perhaps the Matter might be finally determined in his Favour, without a Sci. Fac. to Mr. Lucy the Promoter, who had been at the charge of the Prosecution; and by consequence concerned in point of costs, the Excommunication being for Non-payment of them: To which it was answered, that tho' the Writ nor the Statute of the Queen, did require the Sheriff to bring him into Court, upon the Return of the Writ; yet the Writ was returnable, and he coming in upon a Habeas Corpus, and pleading to the Writ, at the Day of the Return of it, the Court could not deny his Plea; and that he was not bound to bring a Sci. Fac. to which the Court inclined; but if he had come in after the Return of the Writ, and desired to plead for his discharge, there perhaps a Sci. Fac. would be necessary. And Note, Here he had Oyer of the Writ returned before he put in his Plea, which was judged necessary. Note likewise, there were two other Writs out, and the Sheriff returned upon the Habeas Corpus, that he had him in custody upon both of them; but the two latter were not yet returnable, one of them being returnable the last Day of the Term.

Vide infra.

And

Opinio Curia.

And per Cur. His Plea could not go to them, they being not in Court till they were returned; for the Enrolment of them, is only before they are delivered out to inform the Court, that there are such Writs gone out; upon which if there be a Return of non est inventus, they may award a new Process, or if it be ill, when it comes back, to receive Plea or exception to it, and so quash it, and set the Party at Liberty; but still they are not the Writs of this Court, so as this Court can supersede them: And the Chancery neither can't supersede them, which was observed to be very inconvenient; for here would be a Writ erroneously issued out, and it should be out of the Power of any Court of England to supersede it.

Note,

Vide Supra.

So then the Plea being received, and going generally to the Writ, it was again questioned, whether there should not be a Sci. Fac. to the Promoter? And that there should, were quoted the Case of Codrington ver. Rodman Jones, and 1 Cro. 168. 2 Rol. Ab. And he compared it to the Case of pleading a Pardon, where there must be a Sci. Fac. And Holt said, That in Case of Pardon by Parliament, tho' it extend to all the King's Subjects; yet the Court is not bound to take Notice of it, if it be not pleaded, if the very Act does not expressly command them to do it; and the Court said, That the consideration of a Promoter in this Case, in regard to his costs, would be different from a Case, where one sues for Tithes, or for Defamation, or the like; for there the whole Suit is the Plaintiff's: But here the Suit was the Queen's, and Lucy only Promoter.

Opinio Curia.

Per Cur. One may have a Day given him upon a Hab. Corp. for the Queen, because she is always present in Court. And if a Man outlawed, be taken upon a Cap. utlagatum and brought in custody into Court, upon the Return of it, that is a sufficient Day for the Defendant to plead against the King: And yet there he can't plead to have Pardon allowed, without a Sci. Fac. against the Party to the Original Suit, which Sci. Fac. is to be taken out, and grounded upon the Letters Patents of Pardon suggested; but the present Case is not like that, for here the Promoter is not such a Person as ought to have a Day in Court, before the Plea on the Excom. cap. be determined. And because they insisted upon the Plea here, the King's Counsel had Time ad respondendum to their Plea. Note, It was not ad replacitandum. And here again

again they prayed he might be bailed; and for Authorities were quoted 1 Cro. 507, 552, 558. 1 Bul. 122. Latch. 174.

Holt, It has been done, but it is Matter discretionary in the Court, whether they will do it or not, And why shall they do it upon such a Plea as this, which is meer Fact?

And though Powell said, by the Statute of W. 2. he ought not to be bailed; yet it was agreed, That Ad did not absolutely bind the Court, but that they had a discretionary Power, and it was done not long ago in the Case of Davison, who was excommunicated for teaching without Licence.

Holt, If a Man be taken in Execution, and he bring an Audita querela, upon producing a Deed of Release, and Proof made thereof, we do bail him though that be Matter of Fact: But here it is notoriously known that the Doctor is deprived, and some of the Judges of this Court have been of the Delegates when the Sentence was confirmed; and though judicially we can't take Notice of that Sentence, it not being judicially before us, yet we can take such Notice of it as to guide our Discretion by it. And it was said by the Court, That one had never been bailed in this Case, but upon such Exception taken as the Court plainly saw was not maintainable; but according to your Plea, a Bishop can't be excommunicated, so as to be any way more punishable than in the Primitive Times, before the Church had any Help of the Lay-Power. And he was committed again to Newgate, there being two other Writs on which he was taken, yet unreturn'd.

Note, After this and before the Day of return of the other Writs, Mr. Attorney-General came and inform'd the Court, That the Doctor had served a Rule on Sir Samuel Astry Clerk of the Crown, to reply to his Plea by such a Day; and at the Day he took out a peremptory Rule to plead, and served it on Mr. Attorney. And because the Court was acquainted by Mr. Attorney, That the Queen was concern'd in Point of Interest, there being an Information of Intrusion against him in the Exchequer for the Temporalities. And the Court were of Opinion, the first Rule ought to be on the Attorney-General; and for that there never is a peremptory Rule in the 1st Instance, the Rule on Mr. Attorney was set aside; It was agreed, if this were a common Crown-
Cause

Rule to Reply.

Note.

Cause, as a Riot, Misdemeanor, &c. the Rule ought to be on Sir Samuel Astley : But here the Queen being concern'd in Point of Interest, it ought to be on Mr. Attorney-General. Vide post.

Fish & Horner.

Bail.

It was agreed, That if a Plaintiff accept of an Assignment of the Bail-Bond, and the Defendant put in the same Bail that were put into the Sheriff at the Return of the Writ, the Plaintiff cannot except against them; secus, where he has not taken an Assignment.

Debt on Judgment pending Error.

It was Debt upon a Judgment in the Common-Pleas pending a Writ of Error, and the Writ of Error pleaded in Abatement; and to maintain the Plea, the Case of Cremer and Wickett, lately in this Court, was cited. But per Powel, It has been often attempted, but never could obtain; and so, he said, it had been resolved by all the Judges upon Consideration had: But he said, The Court would discountenance such Proceedings; and therefore would not hold the Party to bail.

Time to plead in Abatement.

Note here, Upon Debate about the Time in which one might plead in Abatement. Mr. Clarke the Secondary said, That it had been settled here, that if a Declaration be deliver'd the last Day of a Term, the Defendant shall have four Days in a subsequent Term to plead in Abatement. And if a Declaration be deliver'd the last Day of a Term, as of a precedent Term, the Party shall have four Days after the actual Delivery of the Declaration to plead in Abatement. But Judge Powell said, One could not plead as of a precedent Term without Imparance; to which Mr. Clarke answer'd, he might enter it upon the Post-Roll without any Imparance, and then the Plea is of that Term of which the Declaration is.

And Note, The Declaration must be as of that Term in which Bail is filed; and the Defendant in another Term is not bound to accept a Declaration as of a Term precedent. And Mr. Clarke said, That though by Consent the Defendant does accept a Declaration the last Day of Trinity-Term as of Hilary-Term, yet he shall have four Days in Michaelmas-Term to plead in Abatement.

Brad-

Bradford a Quaker-Woman, being charged on Oath to have published a Book called the Dutch-Catechism, was bound to appear at the Old-Baily, and obliged to give four Persons bail in 200 l. each; but being a Feme-Covert, she was not bound her self.

Bail Feme-Covert.

It is a standing Rule of Court, That in a Country Cause after an Assize, or in a Town Cause after two Terms, they never stop Proceedings upon a Bail-Bond upon filing common Bail.

Stay Proceedings on Bail-Bonds.

Domina Regina & Lilly.

Indicement for Assault and Battery, and taking out of the Custody of A. and B. several Goods mentioned in the Indicement, quæ quidem bona one J. G. Serjeant at Mace to A. and B. then Sheriffs of London, virtute ejusdem Warranti, to them duly made in that Behalf, then had taken in debita juris forma, by Reason whereof they had the Goods in Custody.

Indicement, Property.

1. Exception: Not laid that the Property of the Goods was in any Body.

2. Not laid that there was any Judgment or Execution thereupon: And for these Exceptions it was quash'd.

My Lord Wharton & Sir John Robinson, Mil'.

A Trial at Bar concerning Boundaries of Lands: The Parson of the one Parish, the Land lying in two Parishes, was refused, because he might enlarge his own Parish, and by Consequence the Tithes. But one who about seven Years before had taken the Profits under the Title of one of the Patties, was received a Witness, because now he might plead the Statute of Limitation.

Evidence, Witness, Parson's Bounds of the Parish.

Per Holt, If A. be bound in a Bond to B. to pay him 20 l. When B. puts in his Answer in Canc. there B. to bring Action, ought to give A. Notice of his having put in his Answer.

Notice of Answer in Canc.

Thomkins

Thomkins & Hill

Evidence,
New Trial.

It was agreed by the Court, That if any Judge of Nisi prius allow or over-rule Evidence, which he ought not to have done, upon application to the Court they will grant a new Trial; for all Writs of Nisi prius are under the Controul of the Court out of which they issue. Vide ante.

Withers & Harris.

Execution
a Year and
half after
Judgment.Argument
against the
Execution.

Judgment was in Ejectment upon Terms, That there should not be Execution till such a Time, which was a Year and a half after; and whether this Judgment could be executed without a Sci. fac. was the sole Question.

Mountague, It can't; for in all Cases both of real and personal Actions, if the Plaintiff take not Execution within the Year and Day, the Plaintiff is put to have his Sci. fac. A Year and a Day is the Time limited by Law for many Purposes, for prosecuting his Right; as to bring an Appeal, to make claim on a Fine by Common Law; and at Common Law in a real Action after Judgment, if the Party did not sue Execution within a Year, he was put to a Sci. fac. In a personal Action, he was put to a new Action upon the Judgment until the Statute of W. 2. c. gave a Sci. Fac. And the Reason was, because, that in that Time several Things might happen, which would be a good Bar of Execution, if the Defendant had Opportunity to plead them, which Opportunity is now allowed by the Sci. Fac. but nothing is pleadable to a Writ of Execution, 1 Inst. 290. b. 191. a. And the Reason why a Sci. Fac. lay at Common Law, was, for that in a real Action one could have no other Advantage of his Judgment: But in a personal Action, where an Action would lie on the Judgment, no Sci. Fac. lay in that Case; and he said, No reasonable Diversity could be made between the Case of habere fac. sei'nam and this Process in this respect: For if a Defendant in Ejectment had any Matter pleadable in Bar of Execution in one Case, why should it not be so in the other? And he said, there was but one Case that he could find, that afforded the least ground for such Distinction; and that is, 1 Sid. 35. 2 Keb. 370. It was a Judgment in Ejectment in the Common-Pleas, and Record brought hither by Error within the Year

and

and Day, says the Book. But the Court took it to be after the Year. The Plaintiff in Error died, and the Plaintiff in Ejectment took out Execution without a Sci. Fac. and a Superedeas prayed. And the Court said, That though after the Year there ought to be a Sci. Fac. to have Execution of the Damage, yet there need none to have Possession of the Land, and the Book takes Notice that it was said at Bar, the like Judgment had been before given in another Cause: But this was a Cause where the Defendant himself had brought a Writ of Error, and after, within a Year he died, so that it was not the Fault of the Plaintiff that Execution was not sued sooner. And upon Writ of Error brought, if the Plaintiff in Error discontinue his Writ or it abates, or Judgment be affirmed, though in the mean Time above a Year pass, yet the Plaintiff in Ejectment shall not there be put to a Sci. Fac. but where the Plaintiff himself delays for a Year, he shall be put to Sci. Fac. Cro. Eliz. 706. 5 Co. 88. Gernon's Case. In Debt upon an Escape, in which the Plaintiff declared on a Judgment had by him against A. in June before, and that he had proceeded against him till he had outlawed him; the Defendant brought a Writ of Error, and the Judgment was affirmed in the King's-Bench, and within the Year the Defendant A. was taken by a Cap. Utlagat' and the Sheriff suffer'd him to escape; and judg'd that the Action did lie, and that he was in Execution at the Suit of the Plaintiff, immediately upon his being taken upon the Cap. Utlagat. without any Prayer, because there were no Latches in him; but if there had been Latches in the Plaintiff, there he had not been in Execution, without a particular Prayer made by him to have him so in Execution, as in Case of Judgment in Debt: Where there is a Fine likewise for the King, if the Defendant be taken upon a Capias pro Fine after the Year, he shall not be in Execution for the Plaintiff without a Prayer for that Purpose, because he had pass'd his Time of a Year and a Day without taking out Execution; but if he had been so taken within the Year, he would be in Execution at his Suit presently; and the Reason of these Cases governs the Case before quoted out of Siderfin; for the Writ of Error being by the Defendant, which suspended the Execution till after the Year and Day, the Plaintiff shall not thereby be put to his Sci. Fac. there being no Latches in him; and he quoted Cro. El. 416. 1 Ro. Ab. 899. Cro. Jac. 364. 15 H. 7. 5.

Argument
for the Exe-
cution.

Peirre Williams, contra. 1. He agreed, That if the Plaintiff would recover his Damages, he ought to bring a Sci. Fac. before Execution of the Damage after the Year; for the Day, he said, that was not material, for the Damages are meerly personal; and therefore, no Execution can be of them in this Case without a Sci. Fac. as well as in Judgment in Debt. 2. He held, That the Plaintiff might go by way of Sci. Fac. if he please, but contended that it was not necessary to do so. He said, the Question in the Case in Sid. before quoted was, Whether a Sci. Fac. did lie? but it was allowed to be well without it. v. 2 Keb. 55. Cole's Case. And he said, an Habere fac. Possessionem lay at Common Law after the Year without a Sci. Fac. for in all Cases where a Man's Writ was determined by a Judgment, though he had pass'd a Year and a Day before Execution, yet he had some Benefit of his Judgment; and therefore, if it were in Debt, he had his Action upon the Judgment, being Matter of higher Nature than his first Cause of Action; if the Action were real, he had a Sci. Fac. But in this Case of Ejectment, if after the Year he could not have an Habere fac. Possessionem, he was without Remedy; for it being a personal Action, a Sci. Fac. did not lie before the Statute, and he could not have a new Action upon his Judgment; so he had no Manner of Advantage of his Judgment, if he had pass'd the Year and Day; which were very absurd. And the Reason of a Sci. Fac. in a real Action at the Common Law, was, for that the Party might have a Release or other Matter to plead; and it was thought hard in such Case to suffer Execution to be without an Opportunity of pleading, because thereby the Freehold is not only divested, but the Party put to an Action of an higher Nature, which sometimes the Nature of his Case does not allow of: But that Reason holds not in Ejectment, for the worst that can be, is to bring a new Ejectment, which is determined within the half Year at most. He said, it was a Common Course of Mortgages for the more speedy getting Possession, to give Judgment in Ejectment; yet if after the Year, he should be put to his Sci. Fac. upon such Judgment, it could be of no great Use to him. And he said, That after Judgment one might enter and execute his own Judgment; and that the Assistance of the Sheriff was only to keep the Peace. 2 Sid. 156. 1 Ro. rep. 313. Noy 71. Palm. 363.

Holt,

Holt, C. J. As to the taking of Judgment in Ejectment by Mortgagee, it is a Thing not to be much encouraged, and I never knew any Body use it but one; and what Difference can there be between this and a real Action? for quoad the Term and Possession, it's real. At Common Law, if one had a Term of twenty Years to come and were turn'd out, his Remedy was Ejectment. As Assize or Writ of Right was for a Disseisin of the Fee-Simple or Freehold, so Ejectment was his Remedy when outed of his Term, and a Recovery in Ejectment bound the Term and Right of it; for if there were a Recovery by A. against B. it bound him, and he could not falsify it, but the Recovery made him a good Title; and so in Ejectment, a Recovery made a good Title; and the Party against whom, nor his heirs, could not falsify it. Now if the Recovery were in a real Action, you can't sue Execution till after the Year without a Sci. Fac. And why not so in an Ejectment? For if you have a Judgment, and you let it lie still a Year and a Day, and it be not hindered by a Writ of Error, (for in such Case if the Plaintiff be nonsuited, or the Writ abate, or Judgment be affirmed, he may have Execution without a Sci. Fac.) you shall not execute it after the Year without a Sci. Fac. And as to the Statute of W. 2. He said he was not satisfy'd with Coke's Inference from it, that no Sci. Fac. did lie upon a Judgment in a personal Action; for that does not seem to have been so; for the Statute begins with its Enumerations, where it gives a Sci. Fac. First, Of Records before such as had Power to take such Records as Recognizances, and then fines executory, five contractus, five Conventiones, five Obligationes, five Servitia aut Consuetudines recognita, five alia quæcunque Irrotulata, &c. V. 1 & 2 Co. and many other Books. By Coke's own Rule, where one begins a graduate Enumeration of Particulars, and concludes with these general Words, Et alia, the general Words shall comprehend nothing but what is of an inferior Nature to the first Degree or Particular of his Enumeration; and here to bring in a Judgment had in the Court above under the Et alia, would be contrary to that Rule: But without Doubt, it lay at Common Law in real Actions, and why should the Law differ in the Case of Ejectment from any other Case? I can find no Reason for it. The Party has delay'd himself by not suing Execution in Time; and the Right of a Term is as much bound by a Judgment in Ejectment, as the Right of Land is in a Judgment in a real Action

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Opinion of
C. J.

concerning the Freehold or Inheritance, and none can falsify such Recovery or Recovery in a real Action, but the Issue in Case by the Statute de Donis; and that only indirectly, as by saying that it was by default, if the Truth be so; but he can't directly falsify it in the point tryed; as that there was a faint Title and no Evidence, but a Stranger to a Recovery in a real Action may falsify, and so he may in Ejectment: And I see no inconvenience to put them to a Sci. Fac. and I do believe it's not usual, for either the Party takes Execution presently within the Year, or he's delayed by Writ of Error; if the latter, he may have Execution after the Year, or he has sued Execution within the Year, and continued it by a Vicecomes non milit Breve.

It there be two Plaintiffs in a Personal Action, and one of them dies, that shall not put the other to a Sci. Fac. or if one of the Defendants die; therefore likewise a Sci. Fac. is not necessary, because the same Party still remains on Record, and this has been lately adjudged upon solemn Debate here; I doubt, whether, if there be a real Action and Judgment thereupon; and the Tenant dies within the Year, whether there can be Execution there, without a Sci. Fac. tho' it be within the Year: And I do not know any Authority in Point of it: In personal Action he shall not, because Execution is had against the Party Defendant, and you say in the Writ Fi. Fac. de Bonis & catallis of the Defendant, which can't be after his Death; or capias his Body, which can't also be after his Death. An Elegit is de Terris Tenementis Bonis & catallis of the Defendant. But in real Action, you say nothing but Habere Fac. seisinam; therefore it seems to me that Execution may be there had within the Year, tho' Tenant die, without a Sci. Fac. and therefore you see Shelly's Case; where the Tenant died in the Morning the common Recovery was had; but that Case does not come up to my purpose, because there the Writ of Execution might be tested of that Day. If in Personal Action Execution be sued out, the Death of the Defendant shall not bar the Execution of it; but if it were not out, there must be a Sci. Fac. But if Demandant die within the Year and Day, there must be a Sci. Fac. because they are other Parties who sue the Execution; and whether in Ejectment after Death of Defendant within a Year, you can sue Execution without a Sci. Fac. is the question, but it seems you may; because in the Writ of Hab. Fac. possessionem, you don't say against whom the Execution is to be had, but it's only to have

have the possession ; but after a Year and Day, there might be a Sci. Fac. not only against the Defendant, but also against the Certenants.

Powell agreed, That there ought to be a Sci. Fac. and that there was no difference between this and other Cases, but as to Coke's Opinion upon the Statute of VV. 2. cap. that before the Statute it did not lie in personal Actions, he said the Law had been so taken ever since ; and he said the Judgment in Ejectment is not of the Possession, but of the Term ; and it was the highest Writ a Lessee for Years could have ; and in a Writ of Annoyance there must be a Sci. Fac. after the Year at Common-Law ; but he agreed, if Writ of Error be brought and superseded, or Plaintiff non-suited, or it abate, and Judgment be affirmed ; there, after the Year, a Plaintiff shall not be put to a Sci. Fac. to have Execution : And he said, that in the Common-Pleas, they never took Possession upon a Judgment in Ejectment, without a Sci. Fac. after the Year ; and he said, where one took Judgment in Ejectment for security of his Mortgage, he may secure his Execution after the Year, by taking Execution out within the Year ; and entering Vicecomes non misit breve : And this he said was my Lady Allibon's Case. Of this Opinion were the other two Judges, and Holt declared, he submitted to Coke's Opinion, tho' he saw no Reason for it ; and he said, that a Writ of Error did not supersede the Possession, or hinder the Party of his Entry, if it were lawful before ; it does indeed lie upon the Hands of the Court, that they can't award Execution ; but the Party may enter if he will, and that has been lately resolved in the Case of Badger & Lloyd.

Powell, &c.

Newson & Bawldry.

DEclaration in Prohibition for Libelling in the Spiritual-
Court, for the payment of a Parish-Rate, made at an
Assembly of 20 Parishioners, 15 whereof were against the
Rate, and 5 only for it ; and that the Money was expended in
repairing the Chancel and railing it, and raising the Floor
some steps higher : To which it was pleaded, That the Commu-
nion-Table was, ab Antiquo, placed in the Chancel, and that
there were ancient Rails about it, which were out of Repair ;
that at a Meeting of a Majority of the Parishioners,
the Rate was made to replace the Communion-Table in the

Church-re-
pairs.
Rates.

S

Chan-

Plea amended.

Chancel, and to repair the said Rails; the Plea also contained some other Things which was thought decent to be done at that Assembly, but the matter being ill pleaded, they were directed to amend their Plea; in order to bring the following Points in Judgment.

1. Whether if the Communion-Table were not in the Chancel before, or if there were no steps up to it, and the Parishioners on a Meeting don't find that so decent, the Majority of them can make a Rate to oblige all for altering the place of the Communion-Table, or carrying it into the Chancel, or for raising it higher? And the Court inclined they could; for as to the degrees of Order and Decency, there is no Rule, but as the Parishioners agree among themselves; and tho' they are compellable to put Things in decent order, yet there is no Rule for the degrees of Decency, but the Judgment of the Majority.

2. Whether a Majority of Parishioners may make a Rate to bind the rest for repairing or adorning the Chancel? For that is the special Freehold of the Parson. Cheshire here quoted the Case of Rose and Hawkins, 9 W. 3. in this Court; where a Libel was for a Parish-Rate, to repair a Church and Chancel, and a Prohibition granted for two Reasons; one because the Chancel ought to be repaired by the Parson; the other, for that it was suggested, the Rate was not made by a Majority; yet because they had not gone to try that Point below, the Court said it was no cause.

Fenwick & Gravenor.

In Ejectment, the Wife made Defendant.

HE pretending the Defendant to be his Wife, delivered Ejectments to the Tenants, and she, denying the Marriage, prayed to be made Defendant; which was opposed by the Plaintiff's Counsel, for that if she should have Judgment, he should lose his costs; since he could have none against his Wife. Holt, It is due of Right to the Tenant in possession, and Landlord to be made Defendants; for otherwise the Tenant in possession, might combine with the Lessor of the Plaintiff, and oust the Landlord of his Rent; and to deny the Lady that Right, would be upon the presumption of her Marriage, which would be directly to determine the Point in question; and there is no inconvenience of the other side; for the Plaintiff, if he has

has Judgment, may have costs against the Tenants in possession.

Shortridge & Lamplough.

Error of a Judgment in the Common-Pleas, in an Action of Error on a Covenant upon a Deed of the Lessee, brought by the Assignee of the Reversion; the Covenant was to build several Houses on the Premises: And the Case was this, A. seized of the Reversion of the Lands leased, did bargain and sell the same to B. for a Year, in consideration of five Shillings in Hand paid; and after did release all his Right, Title and Interest in the Reversion to B. and his Heirs, but did not shew that there was any Consideration for the Release, or that there was any express Uses thereon limited; and for this it was urged by the Defendant, that the Release must have enured to the Use of the Releasor: And by consequence the Plaintiff has no Title to the Reversion, and by consequence not to this Action; and for this cause, there was a Demurrer to the Declaration, and a Judgment for the Plaintiff, and Writ of enquiry executed, and final Judgment in Common-Pleas, and Writ of Error brought.

Error on a Judgment in Covenant in C. B.

Lease for a Year, and a Release, but without Consideration or Uses declared.

Raymond for the Plaintiff in Error. After Uses came to be practised in Edward the Fourth, and Henry the Sixth's Time, during the Quarrels of the Families of York and Lancaster, and all along till Henry the Eighth's Time; the State of the Land and Use were two several things, and one might divest himself of the Estate and keep the Use, or Vice versa, or give the Estate to one and the Use to another; and if he had made a conveyance of his Lands without a Consideration, or any express Use limited, the Conveyance was to his own Use: And this was the Law till 27 H. 8. c. 10. as appears both by Practice and Authority of Books. The question then will be, what Alteration the Statute of H. 8. has made? The intent of that Statute was to destroy Uses, by drawing the possession to them and not them to the possession, so that since that Statute the Use draws the Legal Estate to it. If a Man at this Day make a Feoffment in Fee to another and his Heirs generally, without declaration of Use or consideration, it shall be to the Use of the Feoffor; so of Fine or Recovery, and all other Conveyances. Vide Dyer 146. in point, in the Case of a Feoffment; for he says, if there be no Consideration

Argument pro Quer. Uses at Common-Law, and by Statute.

ap.

appearing, or Use express upon a Feoffment, it shall be intended to be to the Use of Feoffor. 2 Rol. Ab. 781. Cro. Jac. 200. *Castle versus Dod*. Co. 58. Latch. 82. in recovery, Pal. 462. Co. Lit. 23. When one makes a Feoffment to particular Uses, so much of the Use as he does not dispose of remains in him as his old Use; and he said that there was no difference when there were particular Uses limited and no Use at all; for what draws the Use out of Feoffor? 'Tis either the Consideration or the expressing it to be to the Use of another; and that Reason holds in both Cases, whether general Feoffment or Feoffment with particular Uses. 3 Lev. 406. Held that there was no difference between, where one seized in Right of his Mother, makes Feoffment in Fee to the Use of himself and his Heirs, and where he makes it generally without limiting any Use; for that in both Cases he shall be in of an Estate descendible to the Heir of part of the Mother; for in both Cases the old Use remains still in him; and the same Rule will hold in this Case of Release, without any Consideration or express Use, the old Use will still remain and be in the Releasee; because the Use and Estate are distinct, and tho' the Estate pass, the Use does not without a Consideration or express Limitation of it; and they are as much distinct things in a Release, as in any other Conveyance: And the Precedents are, that when a Release is pleaded, there always mention is made of a Consideration or express Use. 2 Saund. 11. 277. 2 Vent. 120. Co. Ent. 264, 220, 474. There are indeed many Cases, where they were not so pleaded: But they passed sub silentio, and therefore not to be regarded specially, being against the Reason of the Law. 3 Lev. 233. Covenant brought by an Assignee of a Reversion, to which Grant the Tenant attorned for Non-payment of Rent; and the Books say, that Judgment was stayed for an apparent Fault in the Declaration, because it was not said to whose Use the Reversion was, or any Consideration of the Grant mentioned; and this he relied on, as an Authority in point.

Note.

But Note, The Case in the Book mentions the Grant to have been upon Consideration mentioned in another Deed, which Deed not appearing was considered as if there had been no Consideration at all; and then it appears to be the Intent of the Party, that there should be a Consideration, which not being, it can't be thought that his Intent was to pass it without any Consideration.

Obj.

Obj. A Release enures by way of Enlargement of Estate; and a Lease and Release make but one Conveyance in Law: Lease and Release. So that there being a Consideration, that shall run through, and be communicated to the Estate enlarged. But in Answer; Sure they are distinct Conveyances: One operates by the Statute of Uses, the other by the Common-Law; they are indeed so far one Conveyance, that the whole Estate passes by them both: And the Estate for years is merged and gone, by the Release coming upon it, being to the same Person; but indeed if the Release were to the Use of another, or returned back to the Releasor; the Estate for years would not be merged, because of the Saving in the Statute of 27 H. 8. saving Rights of other Persons.

And he farther took Exception to the Writ of Enquiry; for he said, There was a Variance between the Declaration on Variance. which the Judgment was, and that recited in the Writ of Enquiry; and therefore it can't be a right Enquiry, nor a Writ of Enquiry for their Judgment: The Writ of Enquiry does not set it out in hæc Verba, but by way of Recital; and then it recites all in the Present Tense, instead of the Preter-perfect as it ought: And they give Damages to the Teste of the Writ of Enquiry, when there ought to be Enquiry to the Time of the Action brought: And he compared it to the Case in Saund. 169. where Verditt gave Damage for loss of Service after Declaration; and for this Judgment was arrested. Vide Hob. 189. and the Case of Prince *versus* Molton, Trin. 9. W. 3.

Wells contra. He agreed, That in all sorts of Conveyances, if there be not a Consideration or Use expressed, or necessarily implied, the Use shall remain in the Conveyancer, and shall draw back the Estate to it, and the intent of the Parties is most to be considered in the raising of Uses; and therefore if there be but a Penny paid by him, to whom the Conveyance is made, it will raise the Use to him, without any Declaration: Not so much for the Consideration, as that the payment of the Penny shews the intent of the Parties to be, that he who gives the Penny shall have the Use; for there can be no Reason why a Man should give even the least Sum of Money to another, to make a Conveyance of his Estate, to have it back to himself again. So if a Feoffment be with intent to make one a Tenant to the Precipe, to have a Recovery suffered against him; the Tenant to the Precipe shall have

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Argument
pro Def. of
Uses guided
by intent.

have the Estate to his own Use, otherwise he could not be right Tenant to the Precipe, to have a Recovery suffered against him: And the design of suffering the Recovery, was the Intent of the Party at the Time of the Feoffment.

Releases,
how they
operate.

Nothing passes by a Release to the Lessee in possession, but by way of Enlargement of the Estate of the Lessee; for it does not operate to give a new Estate of the Reversion, but to encrease the Estate in possession according to the Words of it. So it does not work by Merger of the first Interest, but by enlarging of it: But it is true, after the Release, the Lease does not exist distinct from the Estate by the Release; for tho' it does not continue as a Term, yet it is part of the Interest that he now has in him by the Release; for it is not like a Grant to a particular Tenant by him in Reversion, which does drown the particular Estate.

So that if the Release does enure, only to enlarge the Estate, and Interest enlarged must be to the Use of Lessee for years, or it can't be said to be an increase of it; and indeed, if the Practice had not prevailed to the contrary, it were very odd to limit the Use of a Release to any but him that has the Lease: And it is for that we find the Clause in Leases, on which the Party intends to build a Release, that the intent of the Lease was to pass an Estate by Release upon it, for the Benefit or Use of a third Person.

And it would be absurd to say, that my Conveyance should have no other Operation, but to extinguish or merge the Estate that Grantee has already, to have it brought back to me; and what need could there be of such a Way? If the Party had any such intent it might be soon done by Surrender.

If it had been expressed in this Deed, that he had already made him a Lease for Years; and that for the Enlargement of that Estate he made this Release, there had been no doubt but that the Release was to his Use; and there is no difference between the Cases, since this Release in it's own Nature enures by way of Enlargement: Besides, here is also a valuable Consideration: For the Lease and Release being but one Conveyance the five Shillings that are the Consideration of the Lease shall be participated to the Release; and also the acceptance of the Release is in it's own Nature a Release, for it implies an Alteration of the Estate of Lessee, which to consent to

to is a Consideration moving from Lessee ; and the only motive of the Lessee's parting with the old Estate, was to get a new one. He that takes a Release by way of Enlargement of Estate must not only have the Interest, but also a Privy of Estate between him and the Releasee. 1 Inst. 273. a. If A. make a Lease to B. and he make an Under-Lease over, A. releases all his Right to the Under-Lessee and his Heirs, it's void as to enlarge the Estate for want of Privy ; so that it's a privilege inseparable incident to him that has a Privy in Estate to be capable of a Release of Enlargement ; and that is so for the benefit of Releasee.

Raymond said, the first Lease could not be said now to have Continuance ; for after the Lease, if the Lessor before the Lease had suffered Judgment and released, the Judgment would have attached before the Release.

Holt, Ch. J. You would have the Writ of enquiry bad, because you say it gives Damages to the Teste thereof, when it should only be to the Time of the Declaration or Bill ; the Writ directs the Sheriff to take Inquisition what damages the Plaintiff had by virtue of the breach of Covenant ; and not for the Houses being out of Repair, at the time of the Action brought : Suppose the Houses were out of Repair, at the time of Action brought, and become more out of Repair before Judgment, and the Writ of Enquiry ; the Jury that enquires, ought to give the Party, not such Damages as would put them in Repair at the Time of the Action brought ; but such as would be enough to put them in Repair at the time of Enquiry.

Opinion on
the Writ of
Enquiry.

The Question here is, Whether the Statute of 27 H. 8. c. 10. has altered the Ancient way of pleading ? For this manner of pleading was good before the Statute without doubt ; and it appears by so many Precedents since the Statute, that this way was used, even in Case of Feoffment : And it was thought sufficient to alledge the Estate in the Feoffee, without any more. Plow. 478. Feoffment in Fee was pleaded, Virtute cujus he was seized without any more adoe, and so there are many other Cases since the Statute in Coke's Entry's, tho' there be no consideration or Use expressed ; yet it does not follow, that it is to the Use of the Feoffor, for that is Matter of fact extrinsecal to the Deed. If since the Statute of quia Emptor Terrar. a Feoffment were made by Deed,

Question
and Opini-
on upon the
pleading,

and touch-
ing Uses.

Deed without Consideration or Use declared in the Deed; yet the Use might be declared by Paroll, till the Statute of Frauds and Perjuries; and even since that Statute, it may be declared by writing only without Seal. Now for us to construe a Deed to be to the Use of Feoffor, when it might be to the Use of Feoffee, for any thing that appears, would be very odd, therefore we shall intend it to be to the Use of the Feoffee, if no more appear; and if it were not so, it ought to come of the side of the Feoffor or Grantor, by Averment that there was no Use limited to the Feoffee, that is to confess the Feoffment when it is pleaded; but to avoid the effect of it by Averment, and especially in case of a Feoffment or Release to Feoffee or Lessee and his Heirs, without limiting any particular Use; for if it be not taken to be to the Use of Feoffee or Lessee, the Conveyance can't be of any Use at all; for it can't be thought, that one would be at the trouble and charge of any of these Conveyances, to be seized just in the same manner as he was before, and of the very same Estate: For if he had a Warranty to the first Estate, he shall have advantage of it, if he should be impleaded for the resulting Estate: If he were seized as Heir of the part of the Mother before, he would be so after; but before the Statute of H. 8. such Conveyance might be of some Use, tho' no Use were declared upon them, videlicet, to cheat the Lord and hinder Tenants to Precipe's from being known, &c. But now it can't be intended to have been to any other purpose, but to pass the Use and Estate, where there is no alteration made, and therefore it shall be intended to the Use of the Feoffee, &c. if the contrary be not shewn on the other side by Averment; and the Authority in Coke upon Littleton does not contradict this: For it says, where there is a Feoffment in Fee made, and some particular Use limited, so much of the old Use as is not limited over remains in him, as his old Use; for there it appears by limiting the particular Use, that the Feoffment was made to another Person, than to grant an Estate to the Feoffee, to wit, to raise the particular Use: But where there is no Reason appearing, it shall be intended to the Use of the Feoffee, if the contrary be not made out on the other side.

Powell ad idem. And he said, That he was not satisfy'd that the Nature of the Conveyance would admit of a resulting Use; for tho' it be a Conveyance much used now, to raise Uses upon to a third Person by express Words, yet in strictness

ness it is a Common Law Conveyance. And if a Lease be made for forty Years, and a Release thereupon without Consideration or limiting of any Uses, sure it can't be intended to be to the Use of the Lessor; for the very extinguishing the Estate of the Lessee is a good Consideration; and suppose it were a Confirmation, sure it would be the same: But the Chief Justice and he said, That if there were a particular Use limited on the Release, the rest would result back.

Gould said, That he himself had taken the like Exception in the Common-Pleas, in a Case between Reginald and Bishop of London *versus* Pratt, 7 W. Rot. 430. but was over-ruled by the whole Court; and he quoted Lit. fo. 267. Vaughan 44. Lit. 3. 459. Judgment affirmed.

Goodwin & Hilton.

TWAS alledged by the Attorney-General, and not denied by the Court, That before the two Scir' fac's return'd, the Bail may discharge themselves by render of their Principal. Per Holt, The Redditi se can't be entered upon the Bail-piece; for the Sci' fac' is grounded upon that, and the Redditi se would destroy it: But the Remedy of a Bail is upon an Audita querela to be grounded on the Redditi se. And per Cur. If the Render appear to be fraudulent, though it has the outward Shew of a real one, that should not discharge the Bail, as if there was a previous Agreement to let him escape, while he should remain in Custody of the Tipstaff. And it was offered at the Bar, to have been ruled in the Case of Lee and Knipe, That the Principal ought to be two Days in Custody, before an Entry should be made of a Redditi se. And here it was agreed per Cur' and the Attorney-General, That the Bail may render their Principal pending a Writ of Error, though during that Time the Plaintiff can't charge him in Execution. Vide Hob. 116. which was quoted contra.

Bail render the Principal.

Redditi se.

Domina Regina & Smith.

CONVICTION on the Statute of Deer-Stealing in the King's Forest of Rockingham: The killing was in the Time of the late King, and the Conviction in the Time of the Queen.

Deer-stealing.

A

Bro-

King's Capacity.

Dutchy Lands.

Broderick objected, That it was necessary to shew in what Capacity the King was seized of the Forest; for by the Statute, a third Part of the Penalty is given to the King. And therefore if the King was seized in his natural Capacity, it ought to go to his Executor; if in his politick Capacity, it ought to go to the Queen. Holt, The King can have nothing in his natural Capacity, if it be not in Right of his Dutchy, or an Estate-Tail by the Statute of Donis; for if the King purchase Lands to him and his Heirs, he shall have it in his politick Capacity. And where-ever the King is said generally to be seized, it shall be intended a Seisin Jure Coronæ, and Dutchy-Lands would now be in the Queen, if they were not kept separate by Act of Parliament. And if the Queen should create a Duke of Lancaster at this Day, he would not of Consequence have the Dutchy-Lands: And further, it is not material upon the Conviction or Judgment who shall have them.

Forest-Law.

Another Exception was, that the Conviction laid the killing to be in the Forest of Rockingham, where Deer were usually kept, and without the Leave or Consent of any intrusted with the keeping of the said Forest or the said Deer; and a Forest has many Walks and Officers, and it ought to exclude the Leave and Consent of any of them. Holt, It has been indeed held, That Judges are not bound to take notice of the Law of the Forest, ex Officio: But I know no Reason for that. But if you had Leave of any particular Keeper of any particular Part of the Forest, you could not be found Guilty; for Leave of Deputy is Leave of Principal; and Conviction was affirmed.

S. C. Walk. 552. v 2. D. Raym. 109. Rigaut & Gallisard.

Prohibition
Assault, So-
licitation of
Chastity.

DEclaration upon a Prohibition, That at Sessions of the Peace held at Westminster such a Day and Year of King William the third, the Plaintiff was indicted for making an Assault upon one Louise Rigaut, the Defendant's Wife, with Intent to have a carnal Knowledge of her; and it was laid to be against the Peace of the late King, &c. and that likewise the now Defendant brought an Action of Assault and Battery against him in Trin. 12. of the late King, which was likewise laid to be contra Pacem, which Suit is still depending: And yet the said Defendant has ordered him to be sued in the Bishop of London's Court, for Solicitation of the said Louise Rigaut's Chastity to commit Adultery with him.

The

The Defendant pleads for a Consultation, That he is not charged below for any of the Crimes charged in the Indictment or Action, and to this Plea there is a Demurrer.

Mountague for a Consultation: This is a Matter where-
of they have proper Consuance; for by the Libel it appears to
be Crimen incontinentiæ in the particular of soliciting a
married Woman to commit Adultery with him. Vide the
Words of the Statute of Circumspecte agatis, non puniendo
eos si placitum tenuerint, &c. de his quæ sunt merè Spiritua-
lia, viz. de Correctionibus, quas prælati faciunt pro mortali
peccato. viz. pro Fornicatione, Adulterio & hujusmodi, 2 Inst.
487, 488. And it appears by the Word hujusmodi, That
they have Consuance of Things of less Nature than Fornica-
tion, as Solicitation of Chastity; and of higher, as Incest. And
the Reason that the Common Law takes no Notice but of
Facts committed, whereas the Civil Canon Law punishes In-
tentions if wicked; and they go upon the Rule, That a Man
must not look after a Woman to lust after her; for if they
will carry that Desire further, as to endeavour tho' by fair
Means, to put their Desire in Execution, they will punish
them.

Argument
for Consulta-
tion.

Then the Question is, If the Indictment and Conviction
for the Assault and Battery, and the Action depending, will al-
ter the Case, they are several Prosecutions in their Nature
and Design: The Indictment is to entitle the King to a Fine
for the Breach of his Peace, and ill Example to his Sub-
jects in the Assault; and the end of the Action by the Husband
and Wife, is to recover Damages for the particular Injury
done to them; and for each of these, the Punishment is Cor-
poral or Pecuniary: But the Suit below is for Reformation
of his Manners and Salvation of his Soul; and if he be
convicted below, he is only to do Penance, which by Com-
mutation may be changed into Money, as the Statute of
Circumspecte agatis allows; and an Action may be brought in
this Court for the Sum commuted for. Vid. Articuli Cleri.
c. 6. Quando eadem Causa diversis Rationibus coram Judicibus
Ecclesiasticis & Secularibus ventilatur, 2 Inst. 622. So the one
Law punishes the Wickedness of the Mind; the other, wick-
ed Acts; as in Case of laying violent Hands upon a Clerk.
Vid. the Case of Usury in the same Book, 442. And the
Maxim of Nemo debet bis puniri pro eodem delicto, does not
hold in this Case; for that is to be understood, that a Man
shall

Question.

shall not be twice punish'd in the same Manner, as gives Damages twice, or be twice fined upon an Indictment. As if a Man bring Trespass for Maihem, and recover Damages, he shall not after have an Appeal; for the first Recovery may be pleaded in Bar to it; and the Reason is, because both tend to have Damage. 4 Co. 43. If A. steal the Goods of B. and he bring Trespass for them, and is barr'd, yet he may bring his Appeal of Felony for those Goods. By the Statute of 7 Jac. 1. c. 4. every lewd Woman that has a Bastard chargeable upon the Parish, is to be put to the House of Correction and punish'd for a Year, yet she may notwithstanding be punish'd in the Spiritual Court: So if a Man find another Man in Bed with his Wife, he may have an Assault and Battery against him and recover Damages; he shall be likewise punish'd in the Spiritual Court for Adultery. Vid. Sir Philip Coot *vers.* Berte. Vide Duke of Norfolk *vers.* Sir John Germain.

Argument
for Prohi-
tion.

Eyres contra. One is not punishable in the Spiritual Court, for a Solicitation of Chastity, where there is Force used to gain that, though he be in Case of a Solicitation only; for the Force gives such a temporal Mixture to the Offence as ousts them of Jurisdiction, 2 Inst. 488. Merely Spiritual is where there is no Mixture of the Temporality. Fornication when by consent of Parties, is within their Conscience, and so is Solicitation: But if one will go farther and use Force, which, if perfected, would amount to a Rape, and by Consequence Felony, they have no Pretence; for the Solicitation and Force being at the same Time, makes an entire Offence punishable at the Common Law.

Now, As to have one Crime punish'd here and there, the laying of violent Hands upon a Clerk is within the express Words of the Statute of Circumspecte Agatis, punishable there, after it is punished here, but not before, N. B. 430. that if they proceed sooner, a Prohibition will lie. Vid. Pal. 379. Suit was in the Spiritual Court for these Words, You are a Bawd, there were two Couple a Bed in your House; and Prohibition granted upon Suggestion of an Action depending for the same Words at Law.

Opinio Curia.

Holt. The Prohibition ought to stand; for it was but one entire Act, and they below can't divide it: For the Plaintiff in the Prohibition has averred the Fact for which they are indicted, and that for which the Suit is below, to be the same; and

and to give them Jurisdiction below, you should have come and rejoind'd, and travers'd its being the same Fact; but that it was for other Cause than is in the Indictment, and that perhaps would have divided it. And he put this Case, which he said had been adjudged in my Lord Hyde's Time; The Libel below was for saying the Prosecutor had a Bastard; the Defendant comes and suggests for a Prohibition, that he did accuse the Plaintiff below, before a Justice of Peace, of getting a Bastard-Child, and that the Justice did adjudge him to be the reputed Father of it; and that he spoke the Words before the Justice. And it was reply'd, That they were spoke at large, and no otherwise than before the Justice of Peace; and to this it was pleaded by way of Estoppel, That since he had been adjudged before the Justices to have been the Father, he could not sue below for Defamation; and of that Opinion was the Court.

Here you should say, That it was for another Offence than the Solicitation in the Indictment; or that it was at another Time and Place than is laid in the Indictment; and their laying in the Libel another Time and Place than is in the Indictment, is not enough; for below they lay at what Time and Place they please. If a Man sollicite a Woman, and goes gently to Work with her at first, and when he finds that will not do, he proceeds to Force, it is all one continued Act, beginning with Insinuation and ending with Force.

Note, In some Cases there is a concurring Jurisdiction; as in Case of

Pension, Annuity, and laying violent Hands on a Clergyman. *Vide the Abbot of St. Alban's Case in 5 Co. see W. Jo. 246.*

And in the Case of the Duke of Norfolk and Germaine, it was not pretended to be Force; and an Indictment will not lie for a plain Adultery, but Libel below will; though the Law indulges the Husband with an Action of Assault and Battery for the Injury done to him, though it be with Consent of his Wife, because the Law will not allow her a Consent in such Case to the prejudice of her Husband, because of the Interest he has in her: And he compared it to the Case of calling a Woman a Whore and Thief; there she shall not split the Words and punish him below for calling her a Whore, and at Law for calling her a Thief. He agreed, if Adultery be committed with another Man's Wife, without any Force, but by her own Consent, though the Husband may have Assault and Battery, and lay it Vi & Armis, yet they shall in that

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Case

Case punish below for that very Offence ; for Indictment will not lie for such an Assault and Battery, neither shall the Husband and Wife join in the Action at Common Law ; and therefore they proceed below either civilly, that is, to divorce them ; or criminally, because they were not criminally prosecuted above ; and the true Action for the Husband in such Case, is a Special Action, Quia the Defendant his Wife rapuit ; and not to lay it per quod Consortium amisit. Vid. Rastall, tit. Tresp. Cur. acc. for that the Offence is not merely Spiritual.

Domina Regina & Cantuell, al' Sangway.

Excom' capiend.

She was excommunicated below, pro Jactitatione Mariagii, and taken up upon a fifth Process of Excom' capiend, in which there was a Proclamation with Penalty ; and being brought up by Habeas Corpus, and the Writ of Excom' capiend being return'd, that is, the Writ on which she was taken,

Exceptions.

Cheshire took Exception, 1. That this being none of the nine Cases specified in the Statute, this ought to have been a simple Capias, and not a Capias with a Penalty. 2. That there was no Addition as the Statute requires. But per Cur. As to the first, all we can do is to discharge the Penalty. And as to the second, this being not one of the nine Cases mention'd by the Statute, there needs no Addition ; and if it had required an Addition, they doubted at first, Whether they could relieve her upon Motion ? but that it ought to be pleaded. But upon Consideration, they inclined, They might relieve her upon Motion, the Fault appearing on the Record before them ; and if a Plea were necessary here, it was said at the Bar it would be a mischievous Case : For here she was excommunicated at the Suit of her Husband, and he would not join in Plea with her.

Holt answer'd, A Feme-Covert may plead alone in a criminal Matter as this here is, as if she were attainted of Felony, she might plead a Pardon ; but he agreed, That when Husband or Wife are taken upon a Capias Utlagat. the Wife shall be discharged. And he said, That the Reason of the Additions being requisite by the Statute in the nine Cases, and none other, was in Order to a Proclamation and Penalty, but

but that to an Imprisonment by Vertue of an Excom' capi-
piendo, there was no Occasion for it.

Gould, Till the Cause of Brown in Jones, the Law was *Opinio.*
held, That if one were taken upon a Process of Out-
lawry with a Penalty he should be discharged; but in that
Case, and since, it has been held, she ought to be discharged
of the Penalty only, Cro. Ca. 196, 197. And where it
was said, That they were willing to absolve her below, but
that they must have her in Person to give Caution de pa-
rendo mandatis Ecclesiæ, it was answered by the Court,
That that need not be, for they might take a Bond with a
Penalty reasonable from other Persons, with Condition that
she should submit her self; though it is true, the most usual way
is to take juratory Caution; and the Court declared, they
could not discharge her by Law, and so she was remanded.
And Holt here would not determine, Whether the Writ
being with Proclamation and Penalty, when it ought not so
to be, that made the whole naught, or only quoad the Procla-
mation and Penalty?

Greenway & Freeman.

The Statute of two Thirds in Number and Value *Bankrupts.*
was pleaded in Bar, and the Defendant to bring him-
self within the Benefit of the Statute shews, that he ab-
sconded at the Time mentioned by the Statute, but did not
shew for what he absconded; and for this the Plaintiff had
Judgment on Demurrer. Vid. post.

Domina Regina & Twitty.

Mandamus to swear in Church-wardens, to which it was *Mandamus*
returned, That they were not chosen, and held a good *to swear*
Return; for if both were not chosen, the Writ does not com- *Church-*
mand him to swear one of them, so the Return is an Answer *wardens.*
to the Command of the Writ. It was also held by the
Court, That if the Writ of Mandamus were to swear them
that were chosen generally, they might return generally
that they were not chosen; but the Writ setting forth Specially
that they were chosen debito modo, they may Specially re-
turn that they were not chosen debito modo; but such a Re-
turn to a general Writ would be ill. Vid. a Case in Sid. That
if

if the Court does not see Cause of Restitution, though there be no good Return to the Writ, yet they will not grant a peremptory Mandamus.

Hall & Hill, & al'.

Attachment
against Of-
ficers of an
inferior
Court.
Costs.
New Trial.

*See Douglass
Rep. 3. 2d.
377.*

Defendants were Judges of a Court at Bristol, in which the Plaintiff had obtained a Verdict and Damages for 28 l. and the same Day he goes to the Town-Clerk, and gets his Costs taxed, he being the proper Officer, and takes out a Capias against the Principal; and upon return thereof a Sci' Fac' against Bail, who after the Return of a second Sci' fac' surrendered the Principal; after which, and a Year's Time elapsed from the Verdict and taxing of Costs, the Court granted a new Trial; which being complain'd of to the Court in Trinity-Term, Rule was made for an Attachment, nisi.

And now the Attorney-General came to shew Cause, and alledged, The Judges below were in no Fault, for there never was any Judgment enter'd below; and until Judgment enter'd, the Hands of the Court are not tied from granting a new Trial at any Time before Judgment if they see Cause; and if they mistake that for a Cause which is none, that only is an Error of their Judgment for which they are not punishable: And though here a new Trial was granted after a Writ of Error allow'd, that will not alter the Case; for it is frequent to have a Writ of Error allowed before Judgment; and the Proceeding against the Bail was groundless, there being no Judgment enter'd, and such Proceedings did not hinder the Court's being at large to grant a new Trial. And he quoted the Case of Tiny & Roberts, where the Plaintiff having omitted entering Judgment as soon as he might have done it, the Court granted a new Trial; and he said, here the Court were not bound to enter Judgment without Prayer of Plaintiff, though an Inferior Court. 2 Vent. 189.

To this it was answered by Broderick and the Solicitor-General, That the Costs were taxed here by the proper Officer, and that he thereupon had made out a Process against the Defendant; and that is Warrant enough for Execution, though there be not a final Entry of the Judgment upon the Roll,

Roll, which is never done in those Courts till Writ of Error brought; where they are forced to make up the Records, indeed they sometimes enter in the Margin Jud. pro Quer.

Holt. The Writ of Error ought not to be allowed till Judgment given, and it is a good Return to it, that Judgment is not yet given; which the Attorney-General confess'd as to the point of the Return, but affirm'd, That they frequently do allow them before Judgment. Holt likewise agreed, That a Judge is not punishable for an Error in Judgment; but he said, It is rare for the same Judges to grant a new Trial before themselves; as here, after a Trial at Bar, though that he said had been done, though never with his Consent; but 'tis usual to grant a new Trial after a Trial at Nisi Prius, but that is ever after fresh Pursuit, that is, the very next Term; but here it was granted after a Year, Costs tax'd, and as much Entry of a Judgment, as is in any Case there, and Execution taken out; and it is no Excuse for them to say, they are not Lawyers; for they ought to take Advice of Lawyers; and if they are so presumptuous as to take upon themselves the Knowledge of the Law, it ought not to be suffered, though there be no Corruption in them. And he remembred the Case of the Steward of Windsor-Court, who was both Counsel and Judge, and after Bail to the Writ of Error brought upon his own Judgment: But upon Complaint the Judgment was set aside and Restitution awarded. But he said, they would not grant an Attachment for an Error in Judgment, where it is a Matter within their Judgment; but where it is not Matter within their Judgment, as here it was not, they having already given their Judgment, why should not we grant it?

Note, Here it was agreed to be the Course of the Court, *Affidavits* That where upon an Affidavit made, a Day is given to hear Counsel on both Sides, the Party may read as many Affidavits as he please in Corroboration of the first, and concerning the same Matter, but must read none concerning new Matter.

It was also agreed, the Principal can't be render'd by Bail after Plea pleaded: And here the Rule was, That the Rule for new Trial be set aside, and the Rule for Attachment discharged upon Payment of Expences of the Complainant, and Judgment entered below as of the due Time. *Bail render the Principal.*

P

Domina

Domina Regina & Parker.

Plead. Time.
Queen.

Non Pros.
on Indict-
ment.

Indiament, to which the Defendant demurred; and upon Motion, the Queen had six Days to plead peremptorily or join in Demurrer; and within the six Days their Clerk in Court died: And now after three Terms they applied to the Court, which told them, if they had come in any reasonable Time they would relieve them. And here, Per Cur. Non Pros' ought not to be enter'd upon an Indiament, but upon Motion in Court and Leave thereby obtained.

Est & Effington

Custom of
Merchants
on Bills of
Exchange.

Indorsment.

Opinio Curia.

It was an Action by the Indorsee of a Bill of Exchange against the Drawer, declaring upon the Custom of Merchants, and that A. to whom the Bill was made, indorsavit super Billam præd. content. Billæ præd. to him the Plaintiff solvend. And here it was agreed by the Court, That Indorsement is a Term known in Law, and signifies a Writing on the Back of a Paper or Parchment containing another Writing. To this Declaration two Exceptions were taken in Arrest of Judgment: 1. That the Words of the Indorsement were not significative enough to pass the Property of the Bill to the Plaintiff, according to the Custom of Merchants. 2. Exception, That it appears there were three Bills for the same Sum, and that whereon the Action is brought was the first, and says, my second or third not paid, pay this my first. But per Cur. However that Matter would have been on Demurrer, it will be well after Verdict; for if the second or third were paid, there had been no Promise at all, for the Promise is Conditional to pay this, if the second or third be not paid; therefore if the second or third were paid, the Jury could not find for the Plaintiff. And as to the first Exception they held, That that would be likewise good after Verdict; for without finding an Indorsement, they could not find for the Plaintiff. And it is not true to say, That at this Rate, and for this Reason, it may be said, if there were no manner of Indorsement, that defect would be cured by Verdict; for here there is a kind of an Indorsement set forth, and the Jury could not find for the Plaintiff, without finding this to be a good Indorsement, and such as amounts to

to an Agreement, to have the Money paid to the Plaintiff. A Bill of Exchange may be accepted by Paroll, but not transferred otherwise than by Writing upon the back of it, and that transfers the Property by the Custom of Merchants. And they put the Case of Debt for Rent, by Grantee of Reversion, without shewing Attornment, and helped by Verdict; and so in Case of Bargain and Sale, pleaded without Inrolment, good after Verdict. And per Holt; If a Man writes on the back of a Bill of Exchange, This is to be paid to J. S. or the Content of this Bill is to be paid to J. S. and sets his Hand to it, it will be a good Indorsement. Quære pro me, why not a declaration of Trust? But if there be no Indorsement at all set forth, Verdict can't help; And Judic. pro Quer'.

Grips & Ingledew.

DEBT upon a Deed of Articles, whereby the Defendant had agreed to pay the Plaintiff 25 l. for every Hundred stacks of Wood, lying in such a Wood; and so for as many more as should be felled till Michaelmas following. And Plaintiff declared for so much Money as eight Hundred stacks would give at that Rate; And also for as much as some odd stacks more, would give in proportion to the Rate of 25 l. for the Hundred: And to this Declaration there was a Demurrer, because he declared for more than the Articles intitled him to; there being no Agreement for any thing under a 100 stacks; so he demanded more than his Due upon his own shewing.

Agreement.
Variance
inter the
Deed and
Declaration.

Atcherly pro Quer' took this difference; Where a Man is not to recover upon his Deed or Evidence, but upon a matter of Fact arising out of it, and inquirable by the Jury, which is to be the measure of Damages, then one need not expressly keep up to the very Tenor of his Deed; but he may enter non pros' for what he demands too much, and have Judgment for what is justly demanded: And he said that upon this Rule there have been Declarations for less and more than was due, and Plaintiff had Judgment. 2 Cro. 498. Debt upon the Statute of Ed. 6. for not setting forth Tithes; and demands 33 l. as treble damage, the single value being 11 l. and 8 d. as he had averred; and it was moved in Arrest of Judgment, that three times 11 l. and 8 d. did not make 33 l. but 33 l. 2 s. so he declared for less than his Demand; and that he ought not to do, without shewing

Argument
pro Quer'.

how the rest was paid: But per Cur. It was held well upon this difference; Where the Sum is certain upon the very Bond or Contract, without any matter dehors to help it; there one ought not to vary from his Bond or Writing, without shewing how the rest came to be satisfied. But when the certainty of the Demand can't appear, but from matter of Fact dehors of the Deed or Contract, which the Deed or Contract refers to; there if you demand more or less than is due, it shall not vitiate. 2 Cro. 529. And he quoted 1 Saund. 207. Hil. 7. W. 3. Rot. 469. Thwaites ver. Lady Ashfield. 1 Rol. Ab. 785. Stil. 175. And he produced the Roll of the Case of Baber and Pomroy into Court: And the Judgment appeared to be entered for the Plaintiff: It is Hil. 24. Car. 1. Rot. 951. And he quoted the Book of Placita Latina redi-viva, 412. Hob. 178. Debt for one hundred Pounds on three several Bonds; and it appeared on the Declaration, that one of the Bonds was not due.

Opinio Curie.

Note, Here it was agreed by the Court, That so much a Hundred, and so much a Hundred by Retail was the same thing, and that here either Party may tell them out; and that if he that had told them, had not told them right, then the other might shew that, and join Issue upon it. And it was agreed here, That the Property of every Hundred that was cut, at the time of the Agreement, did vest in the Plaintiff; and so of the rest, as they were cut down. If the Sale had been of 500 Stacks out of 700, then Buyer might chuse: But if it were 500 to be set out by Seller, the setting out would be a Condition precedent.

*Argument
pro Def.
Demand en-
tire, or se-
veral.*

Of the other side, a difference was taken between an entire Demand and several Demands joined in one; for in the latter, if the Plaintiff fail in one of them, and is right in the other, he may have Judgment for what is well, releasing what is ill: But where the Demand is entire, and the Plaintiff in making it out, shews he has Right but to part of it; there the Judgment must be against him in the whole, because he is wrong in his Demand. There are some Books which make difference where an Action is grounded upon a Wrong, and where upon a Contract: But the true Reason of that difference (as was said) is because Contracts generally are entire; for let it be for Wrong or on Contract, 'tis the same upon the Difference of the entire and divided Demand; and for this the Case in Hob. 178. was relied on for they are
several

several Causes put in one Action. If Action be brought upon a single Bill, payable at several Days, and one of the Days is not yet come, the Plaintiff shall not have Judgment, for that Part that is due; but according to the Notion on the other side he should; and the Reason why it can't be done is, because it's an entire Demand; and it was said, That the difference taken in Godfrey's Case 11, 45. would not affect this Case; That is, a Man brings an Action for two Things, and of his own shewing it appears, that he can't have Action for one of them, or a better Writ; there the Writ shall be well for that Part for which it is good; And the Case in Cro. is not like this, for there the Defendant severed it by his Plea; for the Jury might apportion it, or the Defendant could do it by his Plea, but he himself cannot do it, by shewing he has no Right to part of what he demands; and the Judgment here will not be final; but he may have a new Action, for what is due; and the Reason of this will hold in a Real Action; for if an Assize be brought of a Manor, the Defendant can't abridge this, by claiming less or shewing Title to less than a Manor; for he must recover the whole Manor or nothing: But if it be for so many Acres, there he may abridge and recover part, because then the Demand is several of several Acres; but where he demands an entire thing, he can't abridge his Demand; but if he join several Causes of Action in one, there tho' he fail in making Title to part, he shall recover the rest, and in the Case in Stile's, Germin was strong against Roll.

Holt C. J. This is no entire Demand, more than every *Opinio Curia.* Action of Debt is, let it consist of ever so many differing particulars, as the Case of the three Bonds before put: Suppose each Bond were for 20 l. the Precipe is of 60 l. and that is all one Precipe; and yet when he comes to declare, he declares upon three Bonds, each of 20 l. that makes up the Sum in the Precipe; notwithstanding if it does appear that one of the Bonds is not yet due, then the Court ex Officio shall abate the Suit as to that Bond, and give Judgment for the rest; so in the Action the Demand is entire, but it is not so in the Original Foundation of it, for that is several; and this is the difference, if there be a certain stated Sum specified in the Deed it self, that shall not be abridged by any Remittitur or Release of the Plaintiff, if he declare upon that Deed. As if a Man bring Debt upon a Bond of 30 l. and declare upon a Bond of 20 l. this will be bad, because

because he has brought his Action for more than is due, and this rests upon the Deed only, and the Sum in it does not amount to his Demand; but if Action be brought upon a Deed which refers to a matter of Fact, that makes the Duty more or less: If then the Fact which is referred to, will entitle him to a less Sum only, and he demands more than the Fact which the Deed refers to upon Computation will entitle him, there let him remit so much of his Demand, as the Fact does not make out, it will be well; and he shall have Judgment for the rest, for that Fact which is not made out, is not contradicted by the Deed. And he said, That the Case of Baker and Pomeroy was an Authority in Point: It was Debt for Rent, and upon Computation it appeared, he demanded more than by the matter of Fact out of the Deed appeared to be due to him, and there he released what was demanded too much, and took Judgment for the rest. And no diversity between a Demurrer and a Verdict, for that Case was upon a Verdict, and this upon Demurrer; And he said, The Case of the Lady Ashley, before quoted, had been adjudged upon the Authority of the Case of Baker ver. Pomeroy.

Powell acc. The Plaintiff must make his Demand entire, tho' he make his Title of several particulars, as some by one Bond, some another; yet being in the nature of several Demands, and made up of several particulars, he may recover on one and not on the other; and the Case of Baker and Pomeroy is exactly this Case in its Reason: And he said, this was not a Demand of one entire Sum mentioned in the Specialty; but of that which might be more or less by matter of Fact out of it; as an Indenture of Lease refers to Days of payment, and one demands more Rent, than there were Days of payment past: So here he demanded more Money than there were Hundreds of stacks, and the ones Case being on Verdict, and the others upon Demurrer, makes no difference: And Godfrey's Case was upon Demurrer; and the question there was, whether the Writ should abate for part, and fail for part, or fail in all? And the same question is of the Count here.

Powis accord. And quoted Hob. 133. and he said, That the Objection that was made, that thus the Defendant might be ensnared into a Demurrer, when he might have a good Plea to bar the Plaintiff; he said, If he had such a Plea he ought to plead it.

Gould conceived a difference between a Demurrer and a Verdict in this Case, and said, If an Assize were for 4 l. Rent, one could not abridge that Demand; and so he said it was in Real and Personal Actions: Debt for Rent, part Seck, and part Charge, the Writ abates in all. 10 H. 6. 5. Dyer 65. Yelv. 66. Judgment pro Quer.

Holt. As to the Case of Assize for 4 l. and shewing only Disseisin of three, that is quite another Thing; for then he brings an Assize of a Rent, of which he was not at all disseised; and he said, This was a Debt indeed arising by Deed, but not a stated Debt in the Deed it self: And he said, The Case was no more, than a Man's avowing for a Quarter's Rent more than is due, and a Demurrer thereupon: He should have a Return irrepleviable for what is due; so of Rent and Nomine Penæ and Title only for Rent, And by three Judges, Judic' pro quer. releasing the overplus.

Yoxon & Bennet.

Errors of a Judgment affirmed in the Court of Chester upon a Writ of Error of a Judgment given in the Corporation-Court of the City, in an Action upon the Case for a Libel; the Declaration set forth, that the Plaintiff was an Alderman of the City of Chester, a Justice of Peace, and a Grocer by his Trade; and that the Defendant did maliciously, &c. publish a Libel of him in these Words, which he caused to be fixed up in several places of the Town: These are to advise all good Persons to shew me, where I may see Alderman Yoxon, to receive my Money of him. A Demurrer to this Declaration, and Judgment for the Plaintiff in the Mayor's-Court, affirmed in the Chief Justice's Court; and here it was assigned for Error, That upon the Pleint le-bied below, the Process to bring the Defendant into Court, was directed to, and executed by the Serjeant at Mace; and after an Interlocutory Judgment in the Demurrer, they directed a Precept to the Sheriff of the County to call a Jury, and enquire of Damages; and it was urged, they could not charge that Officer: But that the same Officer who executed the Mesne Process, should execute the Judicial one; and they said, no Prescription could be to justify these proceedings, because they had no Sheriff till the Time of H. 7. for till the 21st Year of that King, the City was part of the County at large; and they had no Sheriff, but that of the County; and therefore this Sheriff could not be an Officer to the Mayor's-Court, which is by Prescription. 2. Er-

Famosus Libellus, of an Alderman.

Errors assigned on a Judgment in Chester.

2. Error was, that upon an Interlocutory Judgment in an inferior Court, the way to enquire for Damages is, for the Serjants at Mace to Summons an Inquest to appear in Court, and to make enquiry in Court: For it never was suffered in an Inferior Court, that the Judge of it should send his Precept to another Officer, to enquire of Damages; for that is the particular Prerogative of the Courts of Westminster-Hall, to send to the Sheriff to enquire of Damages; and is more than even the Courts of London have ever attempted to do.

3. That the Original was an Attachment per Corpus, which is only a Process in Trespass vi & armis, and not in Case; for in Case the Original Process is an Attachment per Bona, but not to arrest a Man's Body presently.

4. That the Joinder in Demurrer is pet' Judic' pro Dampnis occasione Transgr' pred', instead of occasione Transgr' super Casum.

Argument
contra.

Cheshire contra. It is said before to be Transgr' super Casum, and then Transgr' prædict must be super Casum.

As to the 1st Exception, he said, The City of Chester was an ancient County long before H. 7th time; and it had Sheriffs Time out of Mind, and Process directed to them, and abundance of such Precedents; and the Act of H. 7. was only a Confirmation; and he said, All their Precedents were thus, that the Serjeant at Mace did execute the Helne Process, and the Sheriffs Process after Judgment: And that such a Thing might be good by Grant, and what may be by Grant, might have been by Prescription; and he said, That by Law, the same Person may be Judge and Minister. Vide 1 Cro. 138. Jones 193. 12 H. 7. 3. By the same Reason, several may discharge the Office of one. Vide Mod. 598. Noy. 64. Course of Court is the Law thereof, and need not be shewed specially in pleading. But that the Courts above are to be satisfied of it, by Precedents and Certificates of the Judge of the Court. 2 Co. Wiscor's Case; And there is a difference in the manner of taking Bail in this Court, and the Common-Pleas; and so formerly of Return of Sci. Fac. but this Court did always require two Sci. Fac. and Returns to them both, but one sufficed in the Common-Pleas.

Holt,

Holt. Suppose the first Process to the Serjeant at Mace *Opinio Curia.* were wrong, yet Appearance and Pleading will cure it ; for where a Man has a Day on the Roll, he may appear if he will at that Day, though there be no Return of the Writ ; and Precedents are shewn as ancient as 5 Eliz. of this manner of Proceedings. And Powell said, They could not take judicial Knowledge if the City of Chester had a Sheriff only by Act of Parliament in Time of H. 7. for that Statute, only says, then it was made a County, and the Statute of 43 Eliz. c. 15. ordains, That the Officer of an inferior Court, shall not swear a Jury to enquire of Damages before him ; but the Method is for them to summon a Jury to enquire of Damages, and to swear them in Court before the Steward or Judge of the Court : And Precedents were shewn here, of Writs anciently directed to the Sheriff of Chester, and that there is a Court by Prescription holden there, called the Sheriff's-Court.

And per Powell, An Officer called Sheriff, might have been without a County, and so known Time out of Mind, and a subsequent Act of Parliament making it a County alters not the Prescription : But he said, This could not be made good but by Prescription ; for the same Officer that executes one Process ought to execute all ; and therefore, if upon Exception to the Sheriff, Process be directed to the Coroner, though the Exception be after removed, it shall never after go to the Sheriff ; and though there be no Precedents of these Proceedings but since the Time of H. 7. yet if the current of Precedents have been so ever since, we ought rather to run with the Tide, than to reverse all the Judgments that have been given since ; for in some Cases, Communis Error facit jus. And per tot. Cur. Judgment was affirm'd, without regard to the Inquests being taken before the Sheriff. *Judgment affirmed.*

Oades & Woodward.

UPON a Report by Mr. Clarke Secondary, the Case Warrant of was ; One had given a Warrant of Attorney to enter Judgment against him, as of Michaelmas or any other subsequent Term, and before Judgment enter'd he died ; and after the Attorney enter'd up Judgment, as of a Term when the Party was alive, and the Debate was upon the Regularity *Attorney to enter Judgment, and dead before entered.*

city of the Entry, for that the Attorney's Warrant was determined by the Party's Death. Holt declared himself desirous to know how the late Practice had gone, for he had known various Reports of it formerly; at one Time it had been reported, That if the Plaintiff had enter'd Judgment before the Continuance-Day after the Defendant's Death, it would hold good, but not after; at other Times it had been reported, That he might enter it at any Time before the Effoin-Day of the next Term, as of the precedent Term when the Party was alive; so he said, it had gone both Ways.

Death inter
Verdict and
Judgment.

Attorney-General said, If the Party does not enter his Judgment within the Year and Day, he can't do it after without Leave of the Court, not to be had without Affidavit that the Parties are living; and why is that requir'd, if within the Year it may be enter'd after Death of the Party? Holt. The Reason is, That if he enters it after the Year, he must enter it as of that Term on which he has Leave; but within the Year he may enter of a precedent Term. And Shelley's Case was quoted at the Bar, where Judgment was given after the Party was actually dead, because he was alive in the Morning the first Day of Term. And per Holt, If one dies in the Vacation after Postea settled, after Judgment is frequently enter'd; so if the Rule be for entering of Judgment in Term-time, and the Defendant dies before it is enter'd, it shall be enter'd after; so if the Defendant dies after Verdict against him, after Day in Bank, Judgment shall be enter'd against him.

And it was objected to be a very unequitable Thing; for by this Means, one Creditor would run away with all and leave the rest nothing; and this was said to be against both Conscience and Law; for it was a Rule in Law, whenever a Thing is doubtful at Law, to go by Equity; and that this was a kind of a Fraud; and that a Letter of Attorney was in its own Nature revokeable, and that Death was an actual Revocation; and therefore the Attorney had no Authority to confess the Judgment, and that the Statute of Frauds and Perjuries had made a difference in the Case; for before that Statute, a Judgment refer'd to the first Day of the Term of which it was enter'd; But since that Statute, it refers only to the Time of the actual signing of it, which Time is to be marked on the Side of the Roll; But that can't be done in this Case,
because

because the Attorney has no Authority at the Time the Judgment was actually enter'd, though he had one at the Time it is said to be enter'd; and a Warrant of Attorney is revokeable though the Party covenant not to revoke it.

Of the other Side, Shelley's Case and Sir George Savill's Case in Palmer were strongly insisted on.

Holt. If this be Fraud, it is a Pia Fraus, to get a just Debt by due Course of Law, and he agreed, That a Warrant of Attorney was revokeable in its Nature; But if there be a Warrant of Attorney to confess a Judgment, and after, the Defendant comes and revokes it before it is enter'd, yet the Attorney shall enter it notwithstanding the Revocation; and the Course of the Court has been so Time out of Mind; and the Course of a Court is the Law of it. If Judgment be enter'd in Vacation, and Writ taken out against the Party's Goods as of the Term before, yet the Writ shall levy the Money of his Goods in the Hands of his Executors. If a Fine be acknowledged before Commissioners in the long Vacation, and no Writ of Covenant taken out, then the Party dies immediately, they shall after enter the King's Silver, and take out a Writ of Covenant as of the Term before, and no Body ever stopped upon it; nor was it ever moved in the Common-Pleas, Don't receive this Fine, for the Party died before the Writ of Covenant sued out. And the Statute of Frauds and Perjuries does not extend to this Case; for if Judgment be given against him, and Execution taken out in the Testator's Life-time, it binds the Goods in the Hands of the Executors; and the Statute of Frauds and Perjuries is purely for the sake of Purchasers, and in regard to Lands; but makes no Alteration as to Goods, but binds them only from the Delivery of a Writ to the Sheriff.

Warrant of
Attorney
revoked.

Another Exception was, That upon Search, it was found that no Bail had been filed. But Holt inclined to compel the Attorney to file Bail now; for if it were an Adversary Action they would do, and why not so here? And he said, he was very well satisfied as to the other Point: But upon the last, it was suffer'd to go over till next Term.

Bail filed
after.

Per

*Sci. Fa's re-
turn'd.*

Per Holt. There can't be two Sci. Fa's. taken out together, but the first must at least be seven or eight Days out before the return of it, and then the second to be purchased.

Nicholls's Case.

*Bankrupts.
Two Thirds
Statute pri-
vate.*

WHEN one pleads the Statute of two Thirds, if he would take Advantage of the Clause of being in Custody, he must shew it to have been on the seventeenth of November; if of the Clause of absconding, he must shew he absconded for Debt at the Time of the Statute made. And Holt said, he took the Statute to be a private Law; for though it concern'd a great many, yet it concerned a particular sort of People; and here the Plaintiff had Judgment, because the Defendant did not shew in his Plea, that he had absconded at the Time of the Act made, but only said it was on the seventeenth of November. Vide ante.

Thomkins & Pincen.

*Rent on a
Demise.*

*Variance,
&c.*

IN Debt for Rent, Plaintiff declared on a Demise, bearing Date the 25th of August 11 W. 3. for seven Years from the 24th of June before, paying quarterly at the most usual Feasts following, the Sum of 3 l. 10. viz. Michaelmas, St. Thomas, Lady-day, and St. John Baptist, the first Payment to begin at the Feast of St. Michael, and so from thenceforth every Year quarterly, at the most usual Feasts during the said Term, or within twenty Days after the said Feasts.

Object. The Rent is payable at Michaelmas, St. Thomas, Lady-day, and St. John Baptist, and this Action is brought, primo Anno integro finito 25th of December, and payable then within twenty Days, viz. the tenth of January; so that the twenty Days were reckoned from the right Day on which the Rent was due, viz. 21 December, St. Thomas's-Day.

Opinio Cur.

And per Cur. This Exception, viz. That the Rent was payable on the twenty-first of December, and then the Year ended as to the Rent; and then the Rent had been payable and demandable, if there had not been twenty Days more; the Declaration is bad, for it was for other Rent than was demandable

demandable and payable by the Lease. And the Case of Parker and Harris was quoted : A Rent was reserved half-yearly from Michaelmas, an Action brought for half a Year's Rent ending the 25th of March, which was not half a Year from Michaelmas; and the Rent being reserved half-yearly without mentioning any Day there, there must be a full half-Year before it is due; but otherwise, where it is made payable at such and such Feasts, quarterly or half-yearly; there, though the Quarters or half-year in Reality be not then expired, yet as to the Reservation and Payment it is. And here the Court said, That in this Case an Action could not be brought for the Rent till twenty Days were pass'd; but it was due immediately after the Feast and payable. And here, forasmuch as the Rent declared on, and the Rent reserved by the Deed, were quite different, the Court told the Plaintiff, that he could not discontinue, for this Judgment could be no Bar against the right Rent.

Owen and others of the City of Coventry were bound by Recognizance, and appear'd for two Terms; and no Prosecution being against them; it was moved to discharge their Recognizance, or dispense with their Appearance: But the Court said, they could not do it; and all they could do was to respite their Recognizance. Recognizance respited.

Ode & Norcliff.

It was pleaded in Abatement, That the Defendant was one of the Clerks of the Common-Pleas, and ought not to be sued out of that Court without his Consent. Plaintiff replied, That he did not consent, but laid Venue where, and therefore bad per Cur. Abatement;

Certiorari to remove Orders made concerning foreign Salt, and the Orders returned were concerning Salt in general; and held they were not well removed: For special Certiorari can't remove general Orders, though General will remove Special ones. Certiorari special, Orders general.

Goodwin & Hilton.

Pending Writ of Error, Bail render'd Principal the 20th of December before; and in February following, the Defendant meeting the Plaintiff at large, he told him, he had Bail render the Principal.

B h

render'd

render'd himself in discharge of his Bail. The Plaintiff's Attorney having no Notice of the Render, took out a Capias against the Principal, and Sci. Fac. against Bail, who pleaded Nul tiel Person as the Principal in Rerum natura; and upon Examination of the Regularity of the Render this Matter appear'd,

1. It was agreed by the Court, That Bail might well render during Writ of Error.

2. That by Course of the Court, there ought to be an Entry made by the Defendant's Attorney with all convenient Speed, in a Book to be kept for that Purpose in the Office of King's-Bench, to the Intent the Plaintiff may know how to proceed; that is, to charge the Party in Execution, or to take a Fi. Fac. or other Writ.

3. That by the late Rule of Court, Besides this Entry, there must be two Days Notice to the Plaintiff's Attorney before a Committitur can be enter'd, or a Discharge upon the Bail-piece. Note, It was also agreed, That the Course of Render is upon the Reddidit se, signed by the Judge, to get a Certificate from the Clerk of the Paper to the Master of the Office, which is his Warrant to enter a Discharge upon the Bail-piece; but such Certificate does not make the Reddidit se better or worse. And here was an Entry made in the Book kept in the Office long before the second Sci. Fac. returned, but likewise long after the Reddidit se; and it would have been well as to that, but that it appeared the Defendant had escaped long before.

Costs.
Executor.

Executor shall pay Costs for not going on to Trial: Per Cur.

Domina Regina & John Bucknal, Mil.

Bridge re-
pair'd.

HE was Lord of the Manor of Le More in Hertfordshire, which Manor was held by the Service of repairing a publick Bridge; and though all the Demesnes of the Manor, except the Copyholds, were alien'd; yet it was held per Cur. That all the Alienees were chargeable in Proportion, yet the Queen might charge any of them with the whole, and let him have Contribution against the others: And though the Lord had

had nothing but the Copyhold, yet for as much as the Freehold thereof was in him, he was chargeable, and the Court would direct the Information to be against all the Parties lyable; but let him that is charged, have his Remedy against the rest: Per Cur.

Holt declared, If Complaint were made to him, that some Justice of the Peace had issued a Warrant to take away Goods out of a Man's Possession to which he pretended a Right, he would send for the Justice and bind him over; for People must take the legal Remedy, that is Detinue, Trover, or Replevin. Justices bound over.

Wortley Mountague & Lord Sandwich.

UPON Motion for a new Trial, the Case appeared to be this: An Executor several Years before had left some Household-Stuff in the House by the Consent of the Heir who used them after; and within six Years of the Action brought, the Executor demands the Goods, and the Heir refused to let him have them; whereupon Trover was brought, and the Statute of Limitation pleaded. And per Cur. the User before the Demand was no Conversion nor Evidence of it; for it was with the Consent of the Executor till then. And the Demand being within six Years, the Refusal which ensued it, and is the only Evidence of a Conversion in the Case, was within the six Years; and if a Trover be before six Years, and a Conviction after, the Statute can't be pleaded. Limitation pleaded by Heir against Executor.

Domina Regina & Sturney.

HE was convicted in a summary Manner on the Statute of the 13 & 14 Car. 2. for a Fraud in a Custom; and the Conviction being removed here, was quash'd on Motion. For per Cur. The Statute directs no Particular way of Trial, but only that the Offender shall be fined at the Sessions; and whenever an Act of Parliament makes an Offence, and is silent on the Manner of trying it, it shall be intended to be a Trial per Pais according to Magna Charta. Fraud in Customs, &c. how tried.

Domina Regina & Darby.

Suborna-
tion.
Arrest of
Judgment.

*Capiatur pro
Fine.*

HE being convicted of a Subornation of Perjury and a Judgment, quod capiatur pro Fine, and brought in upon the Capias, and offered to move in Arrest of Judgment; and Court and Bar said, They never had known a Motion in Arrest of Judgment, after a Judgment quod capiatur pro Fine. And it was insisted on for the Queen, that the Judgment was compleat: But the Certainty of the Fine could not be known till the Party be brought into Court, and that in the mean Time there is a short Entry made of the Judgment quod capiatur: But after the Fine is set, then there is an Entry made at large, and that is called the Fine-Roll; and if Judgment should be arrested now upon the Motion, the Entry must be quod capiat. inde sine Die, which would be contrary to the Judgment before, upon which the Cap' pro Fine issued; and the Judgment is as final as it can be, when it is quod capiatur pro Fine, though the Roll be not made up till he be brought in upon the Capias. And the first Case in Palmer was quoted, where it was said, That a Writ of Error would lie of this Judgment before the Fine set.

But Note, There it was a Judgment that he should be ousted of his Franchise, and likewise taken pro Fine; and they said this was stronger than the Case of Ejectment; for there Judgment is not compleat till Damages be found, and yet a Writ of Error lies of the Judgment before any Damages found; and the Reason is, because by the Judgment that is given, the Possession is touched immediately; and where a Judgment is final for any Part, Writ of Error will lie. And here they would have the Capias pro Fine to be in Nature of an Execution, quod Holt negavit, because it is not certain; And he said, that upon an interlocutory Judgment in Case of Trespas, a Capias pro Fine shall go, yet after they may move in Arrest of Judgment; and these are likest of any to the Case in Question. And it is not like a Judgment quod computet; for after such Judgment you can't move in Arrest of Judgment; for then there is no more to do, but to see what is behind: And upon the Doubt, Time was given till the next Day; and it was agreed, That if so be it could not be moved in Arrest of Judgment, it might very well be urged in Mitigation of the Fine, and for that the Exceptions were heard.

1. The Information sets forth, That there was a Cause in Chancery between A. & B. and that a Commission did issue out of that Court to examine Witnesses in the Cause, and that J. S. was sworn a Witness before the said Commissioners, (without saying in that Cause, or what he had sworn.) That the Defendant did solicit him to forswear what he had sworn before; and it not appearing that the Oath was in any Cause pending, or that it was in any material Point, were two Exceptions; for that ought to be set forth, that the Court might judge whether it was a Point material or not; for it could not be Perjury if it were not, and then Solicitation could not be a Subornation.

2. That J. N. was to have been a Witness in the same Cause, and that the Defendant went and desired him to swear such a particular Thing, without averring that it was false, or that he knew nothing of it; and these Objections seem'd of Weight to the Court. And Holt, How shall we judge of the Nature of his Offence, and by Consequence what Fine to set, if we do not know it from the Record of his Conviction? And if a Man be indicted of Perjury, and it don't appear what he swears, and that it was in a Cause depending, and material to the Point in issue, the Indictment will be bad; and the Court is to judge what is material, and that they can't do, if it be not set forth; and by the same Reason, Subornation must be of such a Thing as would be Perjury if sworn, and so must be shewn certainly: But as to the other Point, it seem'd to be a Common Law Offence, to offer Money to swear to a particular Thing whether true or false.

Indictment
of Perjury.

*Domina Regina & Swanson, Baynton, Hartley
& Spurr.*

THEY were all indicted upon the Statute of 3 H. 7. Felony in stealing a Woman. against stealing of Women, &c The Indictment did set forth the Woman's Age, That she was an Heiress to J. S. was worth in Goods and Chattels so much, and so much in Land of Inheritance; That she was a Virgin: And upon Evidence, the Case appeared to be thus: Baynton personating a Country Lady, though in Truth a Woman of the Town, took a Lodging in the House where Mrs. Plaisant Rawlins lodg'd

C c

lodged, (for that was her Name) and after some Time introduced the said Swanson into the House, as her Brother, where he frequently had the Conversation of the said Rawlins: In the mean Time, Mrs. Baynton used to magnify her pretended Brother's Merit and Goodness, insomuch that the said Rawlins had likewise declared her liking of him, and wished he would marry her. But to get her abroad without any of her Friends, Baynton deluded her Aunt and her, to go with her to Church; and against the Time got Bailiffs, to take out a Writ for Rawlins and her Aunt, and so they way-layed and arrested them, and conveyed them from Westminster where they lived first, to the Garter-Tavern in Drury-Lane; and there separated the Aunt and her, and carried her to Holborn to the Vine-Tavern, where Swanson came as her Bail, and there married her, continuing under the Arrest; Baynton telling her, that if she did not marry him, she must go to Newgate: And Swanson and Baynton were found guilty. For the Court delivered it to the Jury for Law: That tho' the said Rawlins had a fancy for the Man, yet because she was not Privy to the contrivance of coming out to him, and knew not before-hand, or consented so to come to him, and being married whilst she continued under that Restraint and Violence, tho' perhaps she consented to the Marriage; yet the said Fact was a Crime within the Statute; for here was a forceable taking away, and her subsequent Consent while under the Restraint, could not be look'd upon, but an Effect of the continuing Force; and that tho' Swanson had known nothing of the first Force, yet he knowing her to be under it; and marrying while he knew her to be under it, made him approve of the first Force, and so partake of it, so as to be guilty. Note, Upon this Statute, All Aiders and Assisters are Principals. And Note, The Man was Hanged: Hartly and Spurr the Bailiffs, were acquitted.

Note

Le Noyer's Case.

Amendment.

IN an inferior Court the Record was made, in the part of issuing the Process, preceptum fuit, instead of precept. est; and because the draught of the Counsel given to the Clerk, to enter up by, was right, it was moved now to amend the Record by it. But per Cur. There never was any amendment by draught of Counsel; for it is a Thing of no manner of Authority, alterable at pleasure, and no Offence to change

change it: And the Case there put of a Bond, is not like this, for a Bond is an Authentick Thing; and an Alteration in it is Forgery, and if the Party himself does it, besides the Forgery, he avoids the whole Bond: And the Statute is to amend where there is a Letter too much or too little, thro' the fault of the Clerk. And Holt said, He would gladly have an Action brought against an Attorney, that makes such a fault in entry, contrary to advice of Counsel: For they sometimes do it out of Malice, and sometimes out of Presumption; besides no diminution lies of a Record of an Inferior Court.

Reignol & Taylor.

ERROR of a Judgment in Trespass at the Stannary-Court. 1. Exception was, That in the Record sent up in the Stile of the Court set forth; they do not say, That it was held within the Jurisdiction of the Court. Vide 1 Co. 51. 1 Inst. 58. 1 Rol. Ab. 533. 434.

Error.
Inferior Jurisdiction.

Holt and Cur. Where you declare in the Inferior Court, you ought to lay the Fact or Cause of Action, to have arisen within their Jurisdiction; or if you declare, that at a Court held, suppose at Maidstone, such a Thing was done, there you must say, That the Court was held within their Jurisdiction of the Court, but when you only set forth the Stile of a Court, you need not shew it. Another Error was, That it was not alledged, that the Plaintiff was a Tinner; and by several Acts of Parliament concerning their Jurisdiction, they ought to shew it: And for this Judgment reversed Nisi.

Cole & Henry.

ERROR of a Judgment in Ejectment in Ireland, in the Court of Queen's-Bench. 1. Error assigned was, that no Juror's Name was entered on the Record. 2. That the Judge who tried the Cause, calls himself the Queen's Judge; and it no where appears that the King was then Dead. Holt, We are to take Judicial knowledge, who reigns over us, and whom we owe Allegiance to; and tho' it be decent to take Notice of the Demise of the King, yet it is not of necessity. And when there is a full Jury, there
never

Error.
Ireland.

never is an entry of their Names in a superiour Court. Et
Judic' affirm.

Harwood & Parrot.

Baron and
Feme.

CASE by Husband and Wife, for malicious Inditing
the Wife of a Riot, 2 Counts. first, shewing the Plain-
tiff's Wife was of good Reputation: And that the Defen-
dant to lessen it, did Indite her of a Riot, of which she was
acquitted. 2. Count was the same, and that the Husband
was put to great Charge: As to the first, it was held to be no
Scandal to be guilty of Trespass; and as to the other, the
Court inclined, that the Husband alone ought to have
brought the Action, for he alone could be put to the charges:
But they delibered no positive Opinion.

Wood & Branford.

Error. Certi-
orari.

ER R O R of a Judgment in Dower in Common-Pleas, and
in Nullo est Erratum pleaded. It was assigned for Error,
that it was against an Infant who appeared by Attorney,
when he should have appeared by Guardian. And per Cur.
Tho' it be after in Nullo est Erratum pleaded, yet we may
grant a Certiorari ad informandas conscientias, and a Dow-
ager is a kind of a Purchaser.

Shield & Cliff.

Misnomer.

CL I F F being sued upon a Bond, by the Name of Peter,
he pleaded in Abatement, That he was baptized by the
Name of Paul, and not by that of Peter; and concludes to
Country. And per Cur. A Respondeas ouster awarded.

Haywood & Davis, & al'.

Trespass.
Abatement.
Tenants in
Common.

TR Espass against two, for taking a Pale of Water out
of the Defendant's Well; Defendant pleaded in Abate-
ment, that the other Defendant and Plaintiff were Tenants
in Common of the Well; Plaintiff replies, That he was
Sole seized Absque hoc, that he was Tenant in Common
with any, and concludes to Country. And per Broderick,

Where

Where an Absque hoc takes in the whole matter of the Plea, there he that takes a Traverse, may conclude to the Country: But where an Absque hoc is upon a particular Fact, which does not comprehend the whole Plea, there he shall not conclude to the Country, but averr. And it was agreed by all, that in the Case of Absque tali causa, one may conclude to the Country.

Holt. In Trespass, it is no Plea in Abatement for a Defendant to say, he was Tenant in Common with the Plaintiff, because he may give it in Evidence upon not guilty; but here the Defendant that was a Stranger pleads Tenancy in Common in the Plaintiff with the other Defendant; and that he may well do. And where one pleads Tenancy in Common, or Jointenancy in abatement of the Writ; and Plaintiff pleads in support of his Writ, he shall conclude to the Country generally; for it is there an Absque hoc upon a special occasion to maintain his Writ, and Absque hoc there is merely put in for Form: And is no more, than that the other who is seized jointly, or seized in Common with him, has nothing there. Vide Dyer 333. Where you traverse a special point, you must conclude with Averment, and not to the Country: But this is not a Traverse of a special point. And per Cur. Respons. ultra. 1 Lev. 261.

Wittingham versus Broderick.

Judgment in Com. Banco, in Trespass by Husband and Wife, for taking away their Goods, reversed, because Wife ought not to join. Baron and Feme.

Crogate versus Martin.

NOT concluding to the Country upon Issue completely joined, good Cause of Special Demurrer. Per Cur. Male conclusion. Demurrer.

D d

Cliff.

Cliffon & Swezeland.

Privilege.

HE pleaded Privilege of Common-Pleas in Abatement, without concluding to Record. Holt, He need not do it, but he may leave Plaintiff Liberty to reply; and deny his being a Person privileged there, which Plaintiff can't do if Defendant conclude to the Record: And his not saying prout patet is no good Cause of a general Demurrer, and upon the prout patet per Recordum, there shall go a Certiorari to certify the Record, and if they produce one and shew they have privilege, Plaintiff is estopped.

Clerk & Yewdall.

*Quantum
Meruit.*

Gramatical
construction.

IN a quantum Meruit Plaintiff declared, That at the request of the Defendant, he had done such and such Services for him, and sets them forth; and that in Consideration thereof the Defendant promised to Pay him quantum Mereretur: Verdict pro Quer', and moved in Arrest of Judgment, that the Consideration being past, it should have been quantum Merebatur or Meritus fuisset. Vide Stiles 444. Assumpsit for Mariners Wages; and laid, that in Consideration that B. deserviret instead of deservivit, and Judgment arrested upon that Exception. Holt, In all our Judgments the entry is quod recuperet, which is a Subjunctive; and yet it is a present Affirmative, and not a future one: For it would be ill to make it future; and it must be translated, that he do recover, in the Present-Tense. So if Present of Potential or Conjunctive be the same with present of Indicative, why shall not Preter-Imperfect-Tense of both Moods be the same? And if this had been merebatur, you had allowed it good. And the Merit is not past, when the Work is done, but continues till Satisfaction. And Plaintiff had Judgment.

How

How & Prin.

IN Case; Plaintiff declared, That he was a Justice of Peace of the County of Gloucester; and also Deputy Lieutenant of the same County; and that he did intend to stand Candidate for a Knight of the Shire of that County, to serve in the Parliament, to be held at Westminster, the 13th of November the same Year, That the Defendant knowing the Premises, and intending to hinder him to be chosen Knight of the Shire as aforesaid, and also to discredit him in the Country amongst his Neighbours; spoke these Words of him, Do not Vote for How, for he is a Jacobite, and for bringing in the Prince of Wales, (*innuendo* the pretended Prince of Wales) and Popery, (*innuendo* the Popish-Religion) to destroy our Nation, (*innuendo* the Nation of England.) And that at another Time, viz. on such a Day in May last; he the Plaintiff being a Justice of Peace, and Deputy Lieutenant of the said County, and also a Privy Counsellor to her present Majesty; the Defendant did speak these Words of him. I (*innuendo* the Defendant) was arrested at the Suit of the Right Honourable J. How Esq; (*innuendo* the Plaintiff) and it has cost me, (*innuendo* the Defendant) 5 l. for my Breakfast, and if you (*innuendo* the Person to whom the Words were spoke; whose Name was set forth) don't Vote for him, (*innuendo* the Plaintiff) He will serve you so too. I know why he did it, it is because I would not give my Consent to bring in Popery and the Prince of Wales, to destroy the Nation. Verdict and 400 l. Damages for the Plaintiff, and after many Hearings in arrest of Judgment: Holt Ch. J. Delivered the Opinion of the Court.

I and my Brothers have considered of this Declaration, and we never spoke of it together till now; and yet we all happen to be unanimous in Opinion, that both these Words are actionable: As to the first Words, it may be fit to explain the meaning of them; and we do take it, that the true Sense of them, as they were spoken was: That by them Mr. How was charged to be a Jacobite; and that he had a design and a formed Resolution, to bring in the pretended Prince of Wales and Popery, to the destruction of this Nation of England.

Opinio Curia.

Obj.

Constructi-
on and in-
tendment
of Words.

Obj. This is no direct charge; And that of bringing in Popery is uncertain; for it is not said, where it is to be brought in. But these Words being spoke with respect to an Englishman, it must necessarily be understood, that he was for bringing of it into England, the Words being spoken here, by one Englishman of another.

And it must be necessarily understood, that they are both Englishmen, for every Man in England, *prima facie*, is to be understood to be of English Birth, till contrary appear. And for Authorities here, he quoted 5 Co. *Caudreys Case*, upon the Statute of 2 Eliz. intitling her to issue Commissions to her natural Born Subjects to have Ecclesiastical Conu-
sance; and the Objection was there taken to the special Verdict, that it was not found the Commissioners were natural Born Subjects: And the Answer to that was, That every one in Commission by the Queen, shall be intended to be a natural Born Subject, till the contrary appears; and here it would be a very foreign Intendment, to intend one that stands for Parliament Man to be a Foreigner, or a Justice of Peace to be so, till contrary appear.

Then if it be taken, that he was an Englishman here in England, of whom it's said by an Englishman here in England, that he is for bringing in Popery; it must be necessarily intended, that it was here in England, especially when it is said in the Words, to be to the destruction of our Nation: So that the Words meant, That J. How. was for bringing in Popery into England, to the destruction of England. Besides if the Words could have reference to the bringing in of Popery into any other Nation, it ought to be shewed on the Defendant's side; and if that had been done, the Verdict must have been for the Defendant: For if the Defendant had been a Scotchman or a Dutchman, and that had appeared upon the Trial to the Jury, in Evidence, they must have given their Verdict for the Defendant; but, *prima facie* being spoken of and by an Englishman, it shall be intended into England. And this appears upon the Consideration of Cromwell's Case, in 4 Co. To say a Man is a Murderer abstractedly is actionable, but if the precedent Discourse will alter the signification, which the Words *prima facie* bear; the Defendant upon Action brought must shew it; as in an Action brought for saying the Plaintiff

is a Murderer, the Defendant pleads not guilty, and it is proved he said it, he may shew that the precedent Discourse was about hunting: And that the Plaintiff said to the Defendant, he had killed so many Hares, upon which the Defendant said to the Plaintiff, he was a Murderer; that alters the signification of the Words, and turns the Verdict for the Defendant. So here, if there were a communication concerning another Country, with another Man than an Englishman, that had altered the Case, and the Defendant must have been acquitted: But without such Mitigation, it must necessarily be intended, that he meant the Plaintiff to be a Person for bringing Popery into England.

As to the Prince of Wales, who is meant by that? You object, we can't take Notice of a Prince of Wales; for there is no such Person in *Rerum Natura*.

Ans. At the Time of speaking those Words, the Law of England takes Notice of a pretended Prince of Wales; as appears by the Statute of 8 & 9 W. 3. So that there was a Person, of whom the Law took Notice, living, and pretended to be Prince of Wales; and why is he called pretended Prince of Wales, but because he himself and others take Notice of him as such, and pretend him to be so?

And he compared it to the Case of a Bastard, supposed to be the Son of such a Father; in law he is not his Son; but when he has the reputation and pretence of being his Son, that pretence is enough to give the Law such Notice of him, as to enable him to purchase by that Name: Therefore it's plain as can be, that J. Howe is by these Words charged with a design, to bring in the Prince of Wales and Popery into England, to the destruction of it.

Then this being the natural Sense of the Words, the question is, whether the Words be reasonable? I am not for declaring my Opinion what the Law would be, in Case the Words had been spoken of a private Man, because it is going further then we need; and to prejudge a point, that is not now in Question, but may come in Question; and therefore for my self, I give this Opinion only upon Account of the Person of whom they are spoke, as it appears on the Declaration.

It appears in the first Words, That he was a Justice of Peace in the County; and likewise a Deputy Lieutenant: And an Action lies against a Person, for Words spoke of one in an Office, upon two Accounts:

First, To charge one in an Office under the late King, or present Queen, with such ill Principles, that are of such a Nature that they make him unfit to bear that Office or Employment, is actionable: For if he had such thoughts to bring in the pretended Prince of Wales or Popery into this Kingdom, it is fit he should be removed from that Trust: Then he as Justice of Peace, ought to punish Popery, to proclaim those that will not come to Church, to try and commit them: Sure then, one that is for introducing Popery, ought not to be intrusted with an Office, the Duty whereof is to punish and suppress it.

Secondly, He is Deputy-Lieutenant, and as such he has Power to defend the Government of the County against all Pretenders; and his being of such Principles, as he is hereby charged with, makes him obnoxious to the established Government; and not to be trusted by it, in a Post that is for defence of that Government, that he is said to be so averse to; when it may be for the Advantage of the Government, to continue him in it; and a disreputation to him to be turned out of it upon Suspicion. 3 Lev. 50. the Case of Sir William Clarges in the Common-Pleas. He set forth, That he was a Justice of Peace, Deputy Lieutenant of such a County, and likewise at the Time of speaking the Words, that he intended to stand Candidate for a Borough, to be Burgess in Parliament: And that the Defendant said of him, That he was a Papist; he is not charged with any Act of Popery, but only that he was a Papist; and that only shews what his Principle and Affection is: Yet being spoke of one in Office of Trust, the whole Court of Common-Pleas held, That they were actionable, for the very being a Papist is good cause to remove him out of his Place; and that Case did not rest singly upon that Resolution: But a Writ of Error was brought of it into this Court, and here the Judgment below was affirmed. Vide the same Case in Raymond.

In the next place, If these Words be well considered, they are still more scandalous, for they don't only charge him with having ill Principles, but likewise with having formed a design to put those ill Principles in Execution, by bringing in Popery and the Prince of Wales, even to the destruction of the Nation: Then if he has such a formed design, that is a very great Crime; and the Case in Lev. is a very strong Case for me, and so is 3 Co. 191. 1 Lev. 335. Sir William Waldegrave's Case, and both the said Books agree in the Report of that Case: He declared that he was a Justice of Peace, Deputy Lieutenant of the County, and a Captain of the Queen's Guards; and that the Defendant having Discourse of him with such an one, his Servant, he said, Thou servest no true Subject, without accusing him with any particular Act, but only generally, that he was not a true Subject: And adjudged, that being spoke of one in that high Station, they were actionable; and that Case has not been yet questioned, but on the contrary, was quoted for good Law in Yelv. 202. 104. Action brought by a private Person for saying, he was not a true Subject, and held it would not lie for a private Person.

The Defendant's Malice in speaking these Words, is pretty full upon this Consideration. 1. They were spoke when the Plaintiff had a design to stand for Parliament-Man; and that the Defendant knew, and the Words were with design to hinder his Election, don't Vote for *Home*, &c. Why? Because he is so and so principled, and so and so resolved to put those Principles in Execution: They were spoken on purpose, and that is a great Indication of Malice; and he designed Credit should be given to his Words.

Obj. May be he designed to bring in Popery and the Prince of Wales, by Act of Parliament.

Ans. That is a very strange way of introducing it in a Protestant Country: But suppose we should intend it here: Are these Persons fit to be entrusted in a Protestant Government, or to be chose Members of their Parliament, that would be for making a Law to subvert the Government and our Religion; and to set up a Pretender to the prejudice of the Title of the Queen? And his not that occasion to remove him? And even in that Sense, the Words would be highly Scandalous, and it would be Time to remove

move him out of an Employment, which gives him such credit in the Country.

Obj. He is not charged with any Act done: This is answered before, in the Case of Sir Walter Clarges, and also that of Sir William Waldegrave; and to make Words scandalous, it is not necessary to charge one with an Act; but it is enough to charge him with having an ill design, and ill Principle: And for that, see 1 Brownl. 5. the Defendant said of the Plaintiff being an Attorney, He is a very good Attorney, but he will plead on both sides; he does not say, that he ever has done it, only (he will,) and held they were actionable, because it shews he was of knavish and corrupt Inclination. Another Case is 15 Car. 1. 1 Rol. Abr. 86. Ellis versus Hunt. March's Rep. 1. In Action the Plaintiff set forth, that he was a Journeyman-Shoemaker, and a Cutter of Leather; and that the Defendant said of him to his Master, You keep such a one, who will cut you out of Doors; and the Words, cutting out of Doors, were taken in the Sense, that he would undo him; and there the Plaintiff is not charged with doing any Act, but only that he would do it, And yet the Words were judged actionable, because of his ill intent.

Obj. This Office of Justice of Peace, or of Deputy-Lieutenant, are not Offices of any profit; therefore being turned out of such Employment, is no loss to him; and the Case of Major Bill was quoted, You a Justice of Peace? you will make such another Justice of the Peace as Major Bill, who is a Blockhead, an Ass, a Coxcomb and a Buffle-headed Justice. And adjudged that an Action did not lye for these Words, because he was not accused of any Corruption in his Employment, or any ill design or Principle; for it was not his fault that he was a Blockhead, &c. For he can't be otherwise than his Maker has made him; but if he had been a wise Man, and had wicked Principles charged upon him, when he has not them, an Action would have lain; for tho' a Man can't be wiser, yet he may be honestest. If a Man be in a place of Profit, and he be accused of Insufficiency, he shall have Remedy by Action: But if he be only in a place of Honour, he shall not have Action for Words of Insufficiency; but even there, if he be accused of ill Principles, and ill-affected to the Government, he shall have an Action.

And the Scandal in the present Case goes farther; for it must be supposed, the Defendant design'd to be believed, when he spoke these Words, because he used this Argument to hinder others from voting for the Plaintiff; for he that hears him, must believe that he has detected this either from some Speech or some Act done by him the Plaintiff; for no Man is supposed to know the Design or Purpose of another, but from his Words or Act; and therefore, when one says positively that A. is for such a Thing, he must take upon himself, that he has detected some Act or Word of him, that gives him good Reason to make this Inference. And it is the most reasonable Thing in the World, to adjudge such Words to be actionable; for they that are in publick Employment, would find it impossible to act with Temper, if the Law did not give them Remedy: For if the Defendant had not been brought to an Account for those Words, what would become of Mr. Howe? For it would be preach'd up in all the Country, and there would be no way to hinder it, it would at last run to common Fame, and that alone is good Cause to hinder a Man's being employed; for no Man that is under an ill Fame, ought to be trusted with a Place or Employment of Trust, and then no Man could safely be in his Place. The second Words are actionable for the same Reason before given; and though it be objected, that the second Words, at least the latter Part of them are Nonsense, He arrested me for not consenting with him to bring in Popery and the Prince of Wales; for none can be arrested for not consenting to such a Thing. Answer, The not doing of it can't be the Cause or Foundation of the Action, but it may be the Motive why he was arrested. Jud. pro Quer. per tot. Cur. Et postea affirm. ind. in Domo Procerum. Judgment.

Harrow's Case.

L I B E L in Spiritual-Court for Substraction of Tithes, for Agistment of Cattle: They pleaded below that they were Inhabitants of that Parish, and the other Tithes were better for the Agistment of Cattle there; and this Matter they also suggested for a Prohibition; but in their Declaration upon a Prohibition, they alledged they were Occupiers.

Prohibition.
Tithes for
Agistment.

ff

Per

Variance
between the
Suggestion
and Decla-
ration.

Per Cur. The Declaration ought not to vary from the Suggestion, and if you do not declare pursuant to Suggestion, Consultation ought to go; for if you discontinue your Prohibition, it shall go of Course; and the Reason why agisted Cattle shall not pay Tithes, is, because the other Tithes of the same Parish are the better for the Agistment there. And Holt said, If you have an House in one Parish and live there, you must not pay Agistment for dry Cattle there. But if you be not a House-keeper there, you must pay Tithes for Agistment. And here the Court would give them Leave to discontinue paying Costs, and pray another Prohibition. And if there be Cattle of Plow agisted in another Parish, they must pay Tithes there where they agist, because they are not Cattle of Plow there.

Pauper.

Per Cur. If a Pauper be nonsuit, there shall be Costs taxed, and he shall not after go on without paying the Costs, or shewing according to the Act of Parliament that he was whipp'd.

Le Sage & Pere.

Principal,
Interest, and
Costs.

AFTER Judgment in Debt upon Bond, the Court will not make a Rule upon a Plaintiff to take his Principal, Interests and Costs; and they held in such Case, the Plaintiff ought to have his full Costs out of the Penalty.

Domina Regina & Lee.

One in Exe-
cution not
chargeable
with an Ex-
com. Cap.

IT was moved, That he being in the Marshal's Custody might be charged with an Excommunicato capiendo. Here was an Excom. cap. taken out of Chancery, and a Non est inventus retorn'd; and it was urged, That it was to no Purpose to take out another, when he is actually in Custody of the Officer of the Court; and it was compar'd to the Case of one in Custody upon Velue Process at the Suit of A. He shall be charged in Execution at the Suit of B. But it was answered of the other Side, That there was a vast Difference; for the Capias upon a Judgment is, ita quod habeas Corpus ejus here at the retorn of the Writ, and there in a Manner the Court is possess'd of him, because there the Pro-
cess

cess is to bring him in hither : But upon an Excom. cap. to the Sheriff, the Sheriff is not to bring him hither, but to keep him in Goal, and he is not to bring him hither but upon Habeas Corpus ; and how can the Court lay hold on one that has no Day in Court, and is not before it ? And the Court asked, if the Statute of 5 Eliz. had not been, what Remedy they had ? And it was agreed, there was none in that Case ; but the Statute has made this Difference, for it makes the Process issuable in this Court, and returnable here ; but does not order the Sheriff to bring the Party in, but to take him and keep him. Holt agreed, If he were taken by Excom. cap. first, and brought up here by Habeas Corpus to answer an Action in this Court, then he should be turn'd over to the Marshal, charged with Excom. cap. But here there is a Process out of this Court, which gives him a Day here, which the Excom. cap. does not ; and the Reason of that is, because he cannot be in two several Prisons at once : But here they would not help, but consider till next Term.

Holt. If a Man be arrested at the Suit of A. and while he is under Confinement of the Bailiff, he give a Warrant of Attorney to confess a Judgment, if there be no Attorney by, it is always taken to be by Duress. But when one is in Gaol a good while, and then another that is his Creditor, or supposed to be so, comes to him, and he voluntarily without any Compulsion does confess a Judgment to him, that Judgment shall stand though there be no Attorney. And if one be imprisoned in the King's Bench, and confess Judgment or Action to another, it shall be good ; as if the Declaration be delivered to one in Custody of the Marshal, and he confesses the Action and gives Judgment, though there be no Attorney by, it shall stand.

Warrant of Attorney, no Attorney by.

Taylor & Griffith.

Judgment of Forcible Entry and Detainer, concluded contra Pacem of the late King and present Queen, the Entry being in King William's Time, and Detainer in the Queen's Time. Per Holt. The conclusion is very improper, but there are too many that way to reverse them all. But it was quash'd upon the Objection, That it did not appear what Estate the Party had, whether Freehold, for Years, or at Will, and so the Court could not tell what Execution to award ;

Entry forcible, &c.

but

but if the Estate were set out, perhaps the Possession should be restor'd to one, and the Freehold to another : And here besides it was not said, That there was a Disseisin of him that had the Freehold, and it was quash'd.

Thimblethorp & Hardesty.

Action by
Principal of
Furnivals-
Inn.

Corpora-
tion.

HE brought an Action as Principal of Furnivals-Inn, and declared upon an Insimul computasset with him for several Sums of Money due to him and the Seniors of the Society. And after Verdict it was moved in Arrest of Judgment, that it can't be his Debt upon this Promise ; for by his Declaration, the several Sums are laid to have been due to him and the Seniors of the Society, and the Promise whether express'd or imply'd, yet still it must be a Promise to them whose Debt it was ; therefore they all ought to join in the Action. Here it was agreed, Church-wardens might bring an Action in their Name for the Debt of the Parish, for they are a Corporation; but here the Plaintiff is none : And the Principal and Ancients ought to join, not as Principal and Ancients, but as they are natural Persons. If an Accompt be made with the Dean of Westminster, for Money due to the Dean and Chapter of Westminster, this is an Accompt with the Dean and Chapter, and the Action must be brought in their Name ; that is, in their politick Name. If Plaintiff be Trustee for the Society of this House, he may sue in his own Name. And per Cur. A Promise to one here, is a Promise to all, and all of them must join in an Action brought upon that Promise, even upon an actual Promise. And the Debt upon the Accompt stated, arises to so many particular Persons, and they all ought to join in the Action : and though the Defendant be one of them, yet the Promise is to all the rest, excluding himself ; and all the rest are Joint-tenants against him ; and a Note made to one of the Society by another of them, is a Note to all except him that gives it. As if there be twenty Partners, and one of them covenant with all the rest, he is in that Respect several from them all, and they all joint against him ; and Judgment arrested per tot. Cur.

How

How & Granville

PER Cur. After Assignment of Bail-Bond, if the Defendant put in the same Bail that were put in to the Sheriff, Plaintiff can't except against them; *Exception to Bail.* secus, if he has not taken an Assignment; and upon Action brought against the Bail, they are not held to bail.

New Trial denied after View, there being Evidence of both Sides.

Dr. Watson's Case, vide ante. 56.

DR. Watson was brought up, and prayed to be discharged *Excom. Cap.* for the Fault in the Writ. Holt. The Case of the King and Fowler was thoroughly considered, not only as to the Process with Penalty, but also, whether it was not necessary, since the Court is to award future Process, to know the Cause of Excommunication in the Writ? And we then thought it was so necessary for this Reason, because the Chancery now have no Power on the Writ; but that Power they had, is by the Statute of 5 Eliz. given to this Court; Therefore, since this Court is to award Process, they must know that it is Matter of Ecclesiastical Conusance; and there is no other way for them to know that, but by its appearing on the Writ: For Chancery can't relieve in the Case, because the Writ is in this Court: If the Cause of Excommunication be not sufficient, the Party has no Remedy but in this Court; therefore the Statute by necessary Consequence of Law, has made this Court Judges of the Writ of Significavit. *Significavit.* And so the very Statute does intimate, when it says, That in Case it be one of the nine Causes, we shall award Process with Penalty: And how can we do that, if the Cause don't appear upon the Writ, and that from the Grounds that we went upon in the Judgment?

Powell. The Form of the Writ was general before, but since the Statute of 9 C. the Process is altered; and sure the Court must know whether you have Jurisdiction below, as before this Statute, they must have satisfied the Chancery; and after the Writ is once here, the Chancery has no

more Jurisdiction. And Eyre said, The Chancery took it they had Jurisdiction still, for they had quash'd an Excom. cap. there that very Morning, which Holt said, They could not do by Law; and Dr. Watson was discharged, and as many Writs as were return'd were quash'd.

Mandamus.

Mandamus moved for to swear in a Chirurgion to an Hospital. Holt said, It could not be, for he was but a private Servant; and it was agreed, a Mandamus had gone to swear a Sexton: The Rule was for them to shew Cause.

Habeas Corpus.

Habeas Corpus can't be after Judgment.

*Distress.
Recaption.*

If one distrain again for the same Rent, the Remedy is Recaption; and if the Sheriff refuse a Replevin, an Action lies against him.

*Execution
of Goods.*

Upon Motion of Trigg against the Sheriff of Kent, Holt said, If a Sheriff return Goods levied to such a Value, he must answer for Goods to that Value, and Plaintiff may have a Venditioni exponas; and if he will not sell them, then the way is to have a Distringas to the Coroner; and that is the right Method to lay him by the heels till he has sold; and sure Debt will lie against him after such a Return, and a Venditioni exponas.

*Notice of
Trial. Eject-
ment.*

In Ejectment, If the Defendant has not regular Notice of Trial, the way is not to confess Lease, Entry, and ouster, but to oppose Judgment against the casual Ejector.

*Administra-
tor. Costs.*

Administrator shall pay Costs for not going on to Trial.

*Certiorari.
Assizes.*

'Tis unusual to send a Certiorari without a special Cause.

*Domina Regina versus Sewel, alias Beaus, at Nisi Prius
coram Holt in Com' Midd.*

*Evidence.
Usury.*

Defendant indicted for Usury, in taking 9 l. for the Use of 45 l. for a Year, contra formam Statuti. The Case was, The Defendant lent the Prosecutor 45 l. upon a Pledge of Jewels, and it was agreed to pay the said Interest; after, the Prosecutor gave his Bond for the same Money,

ney, and the Bond not being discharged, the Prosecutor was produced as an Evidence, and sworn by Holt de bene esse, as he said; and he said, it was a Question, Whether the new Bond were void or not? And he put this Case, A Man makes a usurious Contract, and gives him unlawful Interest, and agrees to give him a Bond for the Principal; and after, by a subsequent Agreement, gives a Bond for the Sum lent to J. S. to whom the Lender owes so much, in Satisfaction of his Debt; this Bond is not voidable by the Statute. If a Man lend Money for the legal Interest, and after, a subsequent Agreement is made for more Interest, which is Usury, that will not avoid the first Contract. Vide 2 Mod. & 1 Saund.

Here Holt declared for Law, That where a Man is interested in the Consequence of that which he swears for; if it be so, the Doing of the Act which he is now Evidence to invalidate or set aside, was a Means to obtain his Liberty from Imprisonment, or an Exemption from Corporal Punishment, he shall be a Witness, as in the Case of Durels, though it be to be set aside his own Bond; yet it being given to obtain his Liberty, he shall be a Witness also, where the Nature of the Thing allows him no other Evidence: As if a Woman give a Note or Bond to a Man, to procure her the Love of J. S. by some Spell or Charm; in an Indictment for the Cheat, though it tend to avoid the Note, yet she shall be a Witness. Note, Here it could not be given in Evidence, That the Defendant was a Common Usurer, because he could not be ready to give an Answer to that Matter.

S. Hill. 1^o Annæ Reg.

In Banco Reginae.

Coram, Holt, Chief Justice.

Powell,

Powys,

&

Gould,

Justices: An. Dom. 1702.

Error in
Parliament.
Supersedeas.

JUDGMENT in Debt upon a Bond in the Common-Pleas, is affirmed upon Writ of Error here, and a new Writ of Error brought in Parliament. Broderick moved for a Supersedeas of the Execution without putting in Bail; for before the Statute in that Behalf, the Allowance of a Writ of Error was in it self a Supersedeas. And this Case he said was neither within the Words or Intent of the Statute; for when the Judgment of the Common-Pleas is affirmed here, there is no new Judgment given here for the Debt, but only the former Judgment affirm'd; and if this Judgment should be affirmed before the Lords, they do not award Execution there, but command this Court to do it, and then the Plaintiff will have the same Advantage as he would have had if the Judgment had not been before the Lords.

Opinion.

And Holt C. J. said, The Recognizance entered into upon the allowance of the Writ of Error in the Common-Pleas, goes only to that Writ of Error that is then brought; and it

is true, if the Judgment affirmed here be reversed by the Lords, it will discharge that Recognizance: But in Case it be affirm'd, here is a Delay of Execution, and Costs that the Plaintiff is put to, and the Recognizance of the Common-Pleas does not reach them. If the Court should erroneously affirm the Judgment in the Common-Pleas, not only the Judgment of Affirmation given by this Court, but likewise the original Judgment of the Common-Pleas would be reversed by the Lords. And this being within the Words of the Statute to entitle the Plaintiff below to bail upon its Removal up hither, when it is affirmed here, and a Writ of Error is brought before the Lords, that Writ of Error is not only of the Judgment of Affirmation given here, but likewise of the Judgment given below; and the Security given is that which makes the Superedeas of the Writ of Error; for that Statute takes off the Superedeas, if Security be not put in; and there is no more Reason to give Security upon the first Judgment than on the second; and how can we take Notice that there is a Recognizance enter'd into in the Common-Pleas, upon the first Writ of Error brought? For suppose it be not so, how shall we discover it? And we are not to presume it; for 'tis not the Duty of the Court to compel a Security, but what they are to do, is to award Execution if it be not done; but the not putting in Bail, does not hinder the Progress of the Writ of Error, but it was only to hinder delay of Execution; and if there be no Precedents in this Point, the Reason is, because of the rarity of the Case. And the whole Court inclined, That it was not a Superedeas without Bail; but upon the Importunity of Bro-
Curia.

Gravenor & Fenwick.

Affidavits to put off a Trial at Bar, set down for the Trial: first Tuesday in Term, upon account of the Witnesses being not likely to be there, denied; for that it was not sworn Endeavours had been used in such convenient Time to have them, that without an unforeseen Accident they would be at the Trial at the set Time.

Page came to the Bar, to shew Cause against a Prohibition to a Suit in the Ecclesiastical-Court of Ely, for a Church-Rate, for repairing of the Church and Church-Dynaments. The Church-Repairs and Rates.

H h

Suit

Suit did set forth, the Church was out of Repair, &c. and that at a Meeting of the Parishioners, a Rate was made by a Majority of them, that the Plaintiff for Prohibition was an Inhabitant and rated so much. The Suggestion was, That J. S. is seized in Fee of the Manor of Dale within the Parish; that he, and all those whose Estate he has in it, Time out of Mind used to repair an Isle in the Parish Church, and in Consideration thereof, were discharged of all Rates for repairing the whole Church, and that the Defendant is Tenant of part of the Manor.

Exceptions.

1. Exception, That the Libel is for Repair of Church and Church-Ornaments, and the Prescription goes only to the Repair of the Church.

2. The tendering of such a Plea below and Refusal of it, is no Cause of Prohibition, but rather of Appeal. Vide 1 Bulst. 16.

3. The Prescription is, That all the Tenants of the Manor were discharged, and he makes himself Tenant of part.

Opinion.

parochiall

Holt. Tho' a Man Time out of Mind repair a Chapel, yet if it be not a Parochial Chapel, having Chapel-Wardens belonging to it, yet it is not Reason to exempt from a Church-Rate to repair; and here if he repairs less than his Proportion amounts to, it may be a Question, if it ought to discharge him? But if he repairs more or as much, it will be good: But this is not Matter to be determined upon Motion. As to the first Exception, if you have not distinguish'd how much is demanded for Ornament, you have not libelled right; and Prohibition if it goes at all, must go for all. As to the third Exception, If the Tenant of the whole Manor has such an Exemption, Tenant in part shall have it in Proportion. And Rule absolute and declare forthwith; For in Prohibition, we may order the Declaration to be delivered as we please in point of Time.

Domina

Domina Regina & Taylor.

Indiament of Forcible Entry upon the Statute of 8 H. 6. Forcible Entry.
c. 9. without saying the Party had been seiz'd and disseiz'd
by Force, and it was quash'd nisi before; and it was urged
for Cause, That that need not be expressly laid. Vide Pop.
205.

Holt. The Case in Popham was upon the Statute of Opinion.
21 Jac. c. 15. upon which it suffices to say, That that Entry
was made upon a Copyholder or Lessee for Years, and that
he was expelled; but the present Case is upon the Statute of
H. 6. upon which you must always alledge a Freehold and
Seisin in some-body; and if it be an Entry upon a Lessee Seisin.
for Years, you must say, the Entry was made into the Free-
hold of A. in the Possession of B. and that so he disseised A.
and of Necessity there must be a Disseisin of the Freehold laid;
and upon Restitution the Possession is restored to the Lessee,
and the Freehold to the other; and on this Statute, Dissei-
sin is a Term of Art, not to be supplied by any other Word.
And Rule absolute per tot. Cur.

Parker & Collins.

The Placit. were Hill. 13 Wil. 3. And the Declaration Amend-
of Easter-Term against the Defendant in Custod. Ma- ment.
rischalli Marischalcie Domine Regine. Per Cur. Let it
be amended, for it's no part of the Declaration, but only
Style of Record; and they said, That after Demurrer, the Time. De-
Party has four Days in Term to join or waive, and plead the murrer.
general Issue. Plea.

Stracy & Saunders.

A Man owes Money by Bond, and also by Award, sup- Election.
pose 20 l. by each, and he pays one 20 l. it shall be up-
on which of both he pleases; for he, and not the Receivers,
is the first Agent. Quære.

Pierce

Pierce & Henriques.

Plea.
Disconti-
nuance.

A Sumpsit and two Counts : Non Assumpsit as to one, and as to the other it being for 100 l. he pleads Payment of 99 l. which the Defendant received ; but pleads nothing to the rest. Plaintiff replies denying the Payment, and after Demurrer ; per Cur. The Plea is well as to the 99 l. for one may plead several Pleas, as Payment of part, and a Release as to the rest, &c. And here it is a Discontinuance ; for he should have taken Judgment by Nihil Dicit, for so much as had not been pleaded to, and plead as to the rest. But it was agreed here, the Defendant could not plead Non Assumpsit in part, and a Release or Payment to the rest ; for that would spoil the whole Plea.

And being spoke to again, it was held a Discontinuance in toto, per Cur. And Holt said, it might be doubted, whether it could be so pleaded in an Indeb. Assump.

Wood & Brauford. *Vide ante.*Error Cer-
tiorari.

In Dower ; It appear'd on Record certify'd up, this being a Writ of Error, That the Defendant being an Infant, had appear'd by Attorney, and this assign'd for Error. And after in nullo est Erratum pleaded, and Demurrer thereupon ; it was suggested, That there was an Admittance of Guardian below, and a Warrant for receiving of the Guardian.

Amend-
ment.

Per Cur. If that be so, it is good Cause to amend the Record ; and as a Precedent was quoted the Case of Waldegrave and Lane, 5th of the late King and Queen : And per Cur. After a good Error in fact alledged, if the Party will not join Issue upon it, but plead in nullo est Erratum, they admit the fact true, and it is a good Cause of Demurrer.

Demurrer.

Chambers *versus* Jennings.

Declaration on a Prohibition to the Court of the Earl Marshal to stay a Suit there against Chambers, setting forth, That Jennings is a Gentleman born, and dubb'd a Knight by King Charles the second, that the Plaintiff spoke these Words to, and of him, You a Knight? You are a pitiful Fellow, and an inconsiderable Fellow, to the great Scandal of Gentlemen and of the Order of Knighthood. And likewise to the great Provocation of Jennings to Duels and Breach of Peace. And it appeared on Pleading, that the Question was,

Court of Honour.

1. Whether there were such a Court of Honour in England, as gave Remedy for Words not actionable at Law, tending to the Dishonour of Knighthood, or of any Body bearing Arms? Question 1.

2. If the Court of Honour had such a Jurisdiction, whether it ought not in such Case to be held before the Constable and Marshal, and not before the Marshal alone? And the Statute of Richard the second was likewise under Consideration. Question 2.

As to the second Point, it was urged, That the Court of Honour hath been constantly held before the Earl Marshal ever since the thirteenth Year of H. 8. when the Duke of Buckingham, the then Constable, was attainted of High-Treason, except it were when a Constable was made by *hac Vice*. *Vide* 4 Inst. 127. Fortescue 22, 32. 7 H. 4. c. 14. *Stamf. Pleas of the Crown*, 65. 4 Inst. 124. 1 Inst. 74. And it was said, That it did not follow from these Authorities, that the Court must be held before the Constable and Marshal in all Cases. 1 H. 4. Ro. Paten. H. 6. 2. *vid.* Cambden's *Britannia* 193. 151. The Earl Marshal is to see Execution done, and yet he is one of the Judges of the Court; and that is like most Mayors Courts, where the same Person is both judicial and ministerial Officer. 1 Ro. Rep. 89. That the Way to recover Fees for making a Knight, is in the Marshal's Court by 13 R. 2. The Marshal has Power where Common Law gives no Remedy, as in point of Precedency. And he quoted a Case in that Court, 12 Jac. the first, when there was no Constable. 1 Sid. 332. 1 Lev. 320. That as to the Matter of Arms, the Court is held before the Marshal only; so in Matter of Honour. 2 Lev. 133. Jurisdiction of that Court.

held that Matter of precedence belongs to the Court of Honour. And tho' all the Statutes that mention this Court take Notice of it, as held before the Constable and Marshal; yet the Reason of that is, that all the Statutes taking Notice of it, were made when there was a Constable and Marshal; and the Constable being the principal Judge, when there is one, there is great Reason to Name him; and if the Court had been suspended since the Annexion of the Office to the Crown, there would be frequent Application ever since for Prohibitions, or complaints to Parliament; for the Marshal has exercised his Jurisdiction ever since, and yet we find no such complaint: And the Famous Case of Sir Francis Michell, deprived by Authority of that Court was quoted, where some of the Judges of the Common Law had assisted. There is no Remedy but here or by Duel: If any assume to himself the Arms of another, or Arms to which he has no Right, he is punishable for the same in that Court. A Pari, if one revile a Person who has right to bear Arms, there ought to be Remedy against him there; and if People find no Remedy at Law for such Words, they will have recourse to the Law of Nature, and do themselves Right by the Sword; to prevent which of late, Actions for Words at Common Law, have of late had much greater Encouragement than Usual. 4 Co. 20. 3 Lev. 330. Rol. Title Prohibition. 15 R. 2. Mem. 23. In the Time of K. J. 1. for calling a Gentleman a Villain, February 1617. Smith *versus* Gaddice. Rushworth's Collections, 1618. p. 2. f. 1055.

Argument
contra.

Raymond contra. This is one of the general Courts of the Kingdom, of whose Jurisdiction and Original this Court will take Notice: But he affirmed the Jurisdiction of it was somewhat dark, there being only obiter sayings of it to be met with in the Books; but the constant Description being, That it is held before the Constable and Marshal is a great Argument that it is not before any other. 48 Ed. 3. 3. 13 R. 2. c. 2. Prin on 4 Inst. 62. 1 H. 4. c. 14. Appeal of Matters out of the Realm, to be before Constable and Marshal. 13 H. 4. 4. & 5. Fortescue c. 32. 37 H. 6. 3. Spelman's Glossary. Crompt. 92. Stamf. 75. 1 Inst. 74. Rushw. 1640. 1066. Nalson 778. It is agreed, that in Matter of Life or Member, they had no Jurisdiction without a Constable; and what is the difference, or the Reason of it? Rushw. 2 part 107. Lisle *versus* Ramsey. Hutton 3. And the Statute of H. 4. does not name them, as giving them a new Jurisdiction. 2. That they have
I not

not Conusance of Words ; he said the Office of Constable at first, was but a low one. Vide Lamb. Saxon Law, Here-took. In France, the main Leaders of Generals of Armies. Vide Spelman's Glossary verb. Marshal. He was an Officer under the Constable, as the Groom of the Stables ; and his business was to supervise the other Officers of the Army. 2 Rushw. Coll. 1056. Court of Chivalry has no Jurisdiction of Words : Besides they pretend only to Conusance of Words, not punishable at Common Law ; and yet they say, the Words in question are provoking to Duel. Vide Hob. 62, 215, 252. Cro. Eliz. 58. 1 Lev. 55. that one is indictable or bound to good behaviour for Words, provoking to Duel.

Holt, It was made an Argument some Years ago, that a Prohibition would not lie out of this Court, to the Court of Honour : Because as was then said, none ever was seen to have gone before ; and they relied on the Statute of R. 2. which proves that if they should encroach upon Things, not within their Jurisdiction, there should be a Writ from the Privy Council to restrain them. But notwithstanding this it was adjudged, That in Case of Encroachments, Prohibitions would lie, and it was the proper Remedy : For it is the Duty and Business of this Court to restrain all manner of inferior Jurisdiction, and to keep them within their bounds ; and the said Statute was made to give a farther Remedy by Privy-Seal from the Council ; and the Reason of that additional Remedy was ; that Thomas Earl of Gloucester, the then Constable, was too great and powerful for the King's Courts to deal with him ; and besides there could not be Application to this Court in Vacation, when they proceed below ; and so it was held by all the Judges.

Opinio Curia.

L. Dyer

Now the first Matter here is, concerning the Constitution of the Court ; and no doubt formerly it was held before the Constable and Marshal, and so all along until the 13th of H. 8. when the then Constable was attainted of Treason. Now then came it to be held before the Marshal alone, and have you any Precedent before that Time, that it was held before the Marshal alone ? And to make it out by Prescription, you can't ; for the first Instance you give, is within Time of Memory, and no ancienter than the Court of the Council of York, which obtained by Encroachment only, For first it was but a Commission of Oyer and Terminer ; yet it after drew in abundance of other Matter, and all by the great Power

Constitution of this Court.

Power of the President of the North: And the Court of Request was only by Entroachment, and they acted like Masters in Chancery, and held Conusance of Matters of Law, without any prescription; and yet it fell at last of it self, without any Act of Parliament; their Process was a Subpoena. And he said, he never knew what sort of Jurisdiction a Court of Honour has, as to Matters arising within England; for the Statute of R. 2. gives them Authority only of Matters arising out of the Realm, and feats of Arms within the Realm: By which they would have meant Coats of Arms and Escutcheons; and he said, the Ministers of that Court understood this matter of Arms well, and gave Coats of Arms and kept Pedigrees of Families; and if they find People that assume Arms, to whom Arms do not belong, or at least those they assume belong not to them, their Way is to post them up, by what Justice or Law I can't tell; and in this Case, what Satisfaction can they make to the Plaintiff? If they fine the Defendant, shall they enforce the payment of it by imprisonment? We have a very known Maxim, that no Court shall imprison, but a Court of Record; and the Court of Honour is none; and the High Commission Court had assumed a strange Authority, more indeed than did belong to it, by the Statute of H. 8. or of Queen Elizabeth, and that they carried their Power so far, by Authority of great Men of the Clergy, that were in the Commission, that it was hard dealing with them in Westminster-Hall; for that Court did assume a Power to imprison, tho' they could not justify it; and he said, It were to be wished the Parliament would give them Jurisdiction of Words, tending to disparage Men of Honour; and such as generally provoke Gentlemen to fight.

Powell, If they have Jurisdiction of Words concerning Coats of Arms, that is not this Case: But here you say, the Words tend to Breach of Peace, and are provoking to fight a Duel; and if so they are indictable. And now this Term it coming on in the Paper, and none appearing for the Defendant, the Court said, that whatever Colour there be to hold Plea of some Things before the Marshal alone, there was no pretence to hold Plea of Words; and ordered the Rule for Prohibition to stand, and let them bring Error in Parliament if they will.

Gery & Hopkins.

UPON a Motion of Mr. Raymond, it was ordered that the Book of Transfer of Stocks, and other Books of the East-India-Company, might be produced at a Tryal to be had the next Day at Guild-Hall, or that the Parties might have Copies of what part of them they pleased to give in Evidence; it being a Cause between Parties having Stock there, concerning which the Action was brought. And per Cur. There is great Reason for it, for they are Books of a publick Company, and kept for Publick Transactions, in which the Publick are concerned; and the Books are the Title of the Buyers of Stocks, by Act of Parliament: And it was granted.

Books of
Transfer
allowed as
Evidence.

Brown & Gibbons, & Ux'.

CASE for Words spoke of Wife, whereby Husband lost his customers; and Verdict, and under forty Shillings Damages; and the question was, whether there should be more Costs than Damages? And it was said, this was not Damages for the Words, but for the consequential Damages; which, as was urged, was not within the Statute; and it was said to have been adjudged, That in an Action brought by a Master, for Battery of his Servant; he shall not be held lower in costs, by Reason of the lowness of Damages; and so it was said in Action for Slandering a Man's Title; and the Court agreed to the Diversity, between Action for Words actionable in themselves, and by Reason of consequential Damage. And here Judgment was entered with a blank for costs, which the Court were offended at, for it could not be filled after.

Scandal.
Costs and
damages.

Domina Regina & Whistler.

ROLFE and others were convicted summarily, upon the late Act of Deer-stealing; and if the Defendant was illiterate & injuste auxiliars & assistens prefat' Rolfe, &c. in illicita & injusta occisione & venatione of the said Deer, viz. persuadendo & incitando the said Rolfe, &c. to hunt and

Aiders in
Deer-steal-
ing.

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kill the said Deer; and lending them Dogs to hunt and kill the said Deer, and Horses to carry them away, contra formam Statuti. And whether Whistler, as charged, be within the Statute, was the question.

Opinion. Gould made two questions of the Case. 1. Whether if the Words aiding and assisting were totally left out of the Statute, they would be guilty within the Statute? 2. Whether in Case they were not, these Words would bring them in? The Words of the Statute are, such as are aiding and assisting therein; and he said the Word therein was the same there, with thereof or thereunto; for he that lent his Dogs to hunt, is aiding in the hunting. And this appears from the Preamble, which shews the Cause of making the Statute, which is, that notwithstanding the many Laws made against unlawful coursing and killing of Deer, That for as much as the Penalties are not sufficient to deter, divers sturdy and disorderly Persons, who confederate together to commit these disorders; and if any of them be found guilty, which is rare, they contribute and make the Penalty light upon him that is so convicted; therefore for the more effectual discovery of such Persons; (What Persons? Such Persons as do confederate) Be it enacted, &c. And the Word such does couple the Enacting part to the Preamble. 2 Co. 15. 1 Inst. 372. 11 Co. Alexander Poulter's Case 30 b. 31. a. And here it would be very mischievous, that the Word should know, that the Statute does not extend to Accessories before the Fact: For then the Rich would incite poor and desperate fellows to hunt, and supply them with Dogs, Horses, &c. And not be punishable within the Statute.

Obj. This is a Penal Law, and therefore to be construed strictly; and aiding and assisting therein, must be in the very Act of hunting.

Ans. Quite otherwise; for aiding and assisting is properly before the Act done. 12 Co. 81. He that gives consent or Aid to a Trespass, is a principal Trespasser; and as much punishable, as he that actually commits it. So is Consent to make clipt Money High-Treason, as much as the actual making. 2 Inst. 183. upon W. 1. c. 14. Under the Word aiding, come all they who Counsel, Abet, Plot, Consent and Encourage the Fact, and are not present at the doing of it.

Secondly. Suppose these Words were not in the Statute, yet the Defendant would be within it ; for it is a Trespass, and I take it that there is no diversity between the Case of Trespass and Felony, as to the aiding and assisting ; only that in one they are Principals, in the other Accessories only. And when an Act of Parliament makes a new Law, and makes a Crime Felony that was not so before, tho' there be not a Word of Accessary ; yet they shall be Felons. Vide Palm. 141. And the Case 13 H. 7. 12. upon the Statute of 3 Ed. 1. cap. 20. De Malefactoribus in parcis, which Cause, he said, could not be distinguished from this Case, for that is a very Penal Law ; for it inflicts three Years Imprisonment upon the Party, and a Fine to the King, and to find Sureties never to Offend more ; and for default of Sureties to abjure the Kingdom, besides a large Amendment to the Party aggrieved : And yet he that did only command, was adjudged to incur the Penalty, which Case he affirmed to run quatuor pedibus with that now in question.

Powis. The Conviction good by Virtue of the Words Aiding and Assisting therein in the Statute, and the Statute de Malefactoribus in parcis did not alter the Offence ; but left it a Trespass as it was before ; and that Statute gave a compleat Remedy to the Cases to which it did extend ; but it only extending to Miskeazance in ancient Parks and Parks of Right, as appears by 2 Inst. 199. there still did remain great defect of Remedy, and no Statute against Deer stealing mentions Aiders and Assisters, but that of W. & M. which has the Words now in question, without which, per Lui, the Defendant could not be convicted : And for the signification of the Words aiding and assisting, he quoted 2 Inst. 182. 2 Cro. 473. is grounded upon a Statute which has not the Words aiding and assisting in it, and if they had, the Person who stood upon the Ladder, would have been ousted of his Clergy. And he would make a difference between Cases of Felony and Trespass ; for Acts of Parliament taking away the Benefit of Clergy in Felony, do not extend to Aiders and Assisters before, but that, he said, was in favour of Life ; but there is no Reason for a strict construction in Trespass : And this Statute, he said, was rather to be called a Remedial than a Penal Law, and concluded that the Conviction was good.

Pow-

Powell accord. 'Tis Objected that this is a Penal Law, and not annexed to the Offence, but to the Person offending under such a Description, and the Aiders and Assisters therein; and the Distinction is taken between Aiders and Assisters therein, and Aiders and Assisters thereunto: He that only lends Dogs, &c. to commit the Fact, is not aiding in the Fact, but to it; so such Person does not come within the description of the Statute: And he agreed a Man may be aiding to a Felony, and present at the doing of it, but he affirmed such an Aider would be a principal Felon; but there may be likewise Aiders that are absent, which in Case of Felony, would only be Accessary, and upon this the distinction is grounded, that one sort are Aiders therein, and the other thereunto.

2. Obj. is, that this is a Penal Law, and for that Reason not to be carried beyond the Letter of it, by construction or Equity; which he agreed: But said, That such as lend Dogs or Horses to hunt, are Aiders in the hunting, as much as Aiders to it, and as much as if they were present at it; because the offence is Trespass, and all Aiders to or in a Trespass, are equally guilty of it, and all Principals: So whoever would persuade a Man to do a Thing which is a Trespass, and that is proved in Evidence, he shall be a principal Trespasser; or if the Thing to which he persuades be Felony, he shall be Accessary to it. And if a new Felony be made by Act of Parliament, tho' there be not a Word said of him that persuades to it; yet he shall be an Accessary if he persuaded before the Fact; if at the Time, he shall be principal Felon, if comforting, receiving, &c. after, he shall be Accessary after. And he said the distinction in the Case of Finch and Evans was very nice; but however not like the present Case, and he quoted the Case of W. 2. c. 34. If a Man ravish a married or any other Woman, he shall have Judgment of Life and Member, and yet what Act can be more Personal and Penal than that? And yet Aiders and Assisters are Ravishers within the Statute; even a Woman that can't commit the Fact her self, shall be so. And by the Statute of 3 H. 7. c. 4. for stealing of Women, &c. all Aiders and Assisters are Principals by the Statute; yet there may be an Accessary, as he that * receives them, after knowing them to be Guilty. And this by construction of Law. And the Statute of Malefactors in Park, is a Penal Statute, and it is not annexed to any Fact committed, but to all Miskea-

* That is, he that receives the Offenders alone, for such as receive the Offenders and the Woman, are Principals, by the very Words of the Statute.

302s, and yet Aiders before the fact, are by construction brought under it. And the first Action that I find brought upon that Statute, was 20 Ed. 3. 11. one broke into a Park and rescued his Cattel, which was a Trespass, and by consequence within the Words of the Statute; and adjudged not within the meaning of it, and that the Trespass meant by the Statute was an unlawful Hunting and killing of Deer. 50 H. 5. 10. Action upon the same Statute and not guilty pleaded; Jury find that the Defendant did break the Park in order to Chase, but killed no Deer, Declaration being that he broke his Park and killed his Deer, and there he was adjudged to be a Misdemeanor, and Judgment was against him upon that Penal Statute. 12 H. 7. 12, & 13. is the next Case that I find in the Books upon this Statute, where it was adjudged that the Defendant's Inciting others to hunt, was a Hunting in himself; and it is a very strong Case upon so Penal a Law, as the Statute is. Rast. Stat. 1 H. 7. c. 5. That if any Person in Day Time, with Uizor upon his Face, or Paint or other disguise, wrongfully chase in the Park of another, every such Person shall be punished as a Felon: So that it is not bound up to the Offence it self, and there is a Proviso in that Act to exempt, &c. And in Case of Felony, whether an Offence be made Felony, or the offender made Felon, they that perswade, incite, &c. would be Accessary to a Felony, and why shall it not be so in Case of Misdemeanor too? And tho' the Case of Page and Haywood make a distinction, where Clergy is taken away from the Offence, and where from the Offender, under the Circumstances described by the Statute; as in the Case of Burglary, that where it is taken away from the Offence, they that are aiding and assisting in the Offence shall lose it; but where from the Person offending so and so, he alone, and not the Accessary, shall lose it: And he said, that Diversity, and also the Case of Evans and Finch, were in favour of Life. And in the Case of Evans and Finch, if they both had got into the House, and one of them seeing the Money, had not touch'd it; but desired the other to fetch it, would not they both lose the Clergy? And the Words of the Statute are, that he that enters and takes Goods to the Value of 5 l. shall lose the Benefit of his Clergy; and he said he could sooner be reconciled to the Case of Page *versus* Haywood, than to that of Evans *versus* Finch. For upon the Union of the two Nations, the Scots brought in the Fashion of Daggers, and much mischief did arise betwixt the English and them, to avoid which the Statute of Stab-
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bing was made. Suppose two Men have a sudden falling out, and a stander-by gives his Dagger to one of them, and desires him to stab him, which he does, and the Man dies; I doubt whether they shall both lose the Clergy: And he concluded the Conviction good.

Holt *contra.*

Holt *contra.* I observe tho' my three Brothers agree in one conclusion, yet they differ in the Premises. Gould says, Aiders and Assisters would be within the Statute, tho' there were no mention of them in it. Powis says, It's merely because of the express Words: And I differ from them both in Premises and in Conclusion: Every Body knows, that this being a Penal Law, ought by Equity and Reason to be construed according to the Letter of it, and no farther, tho' the Fact that you would bring under be within the Reason, and as heinous or more than that which is expressed in it. That this Act is Penal is most plain, for here is a Penalty of 30l. Secondly, which is highly Penal, the Defendant is put to a summary Trial different from Magna Charta: For it is a fundamental Privilege of Englishmen to be tried by Jury, which Privilege has been secured to us by our Ancestors many hundred Years ago: Then when there is a Penalty inflicted, and a different manner of Trial from Magna Charta instituted, and instead of being openly tried by his Neighbours in a Court of Justice, shall be convicted by a single Justice of Peace in a private Chamber, upon the Testimony of one Witness; I fain would know if upon the Consideration of such a Law, we ought not to adhere to the Letter of the Law, without carrying Words farther than the natural Sense of them?

And let the Preamble be what it will, and recite what it will, it is not enough to bring them under any Penalty, if there be not Words in the Enacting part of the Statute to do it.

Obj.

Obj. Because of the Confederacy mentioned in the Statute, it shall take in such as perswade and incite, &c.

Resp.

Ans. No, but by Reason thereof the Penalty shall be greater upon the actual Offenders, and their Trial more severe; and I never heard of such a Rule, that because a Preamble of a Statute recites many particulars, and enacts a Penalty only upon one of them, that the Penalty shall be extended to all by Construction. Then the Words of the Statute are Aiders and

Assisters therein, that is aiding and assisting in the Fact; And he that lends Dogs and Horses to hunt, aids a Man to hunt and kill, but is not thereby aiding in the Hunting and Killing. And the Law makes a great difference in Framing an Indictment in a Case, where one is present, abetting and assisting, and where he is aiding and assisting, but absent at the Time of the Fact committed: If one be present, aiding and assisting in Case of Felony, he is Principal: As if two fight, and one stands by one of them with his Sword drawn, he contributes to the actual killing and that is what the Law generally understands Aiders and Assisters to be. If an Act takes away the Clergy from one that does such an Act, and from Aiders and Assisters; yet it shall not take away Clergy from the Accessary: And for this he quoted the Case in Dyer 186. where the difference is taken, between the manner of an Indictment of an Accessary before; and that is by aiding and assisting to the Thing; if it be after, it is for aiding and assisting and comforting after the Fact; if present, they are said to be aiding and assisting in the Thing.

Obj. This is a Trespass, and in Trespass all are Prin- Obj.
cipals.

Ans. It is very true, if the Statute had inflicted this Pen- Resp.
nalty under the Name and Denomination of a Trespasser, there all that should be perswading, commanding, or any way contributory before the Fact, tho' Absent, would be within it; so if it were after, because they are all by Law Trespassers, and the Punishment is laid upon a Trespasser, but not because he is under such and such particular Circumstances; and so is the Statute of Malefactors in Parks, for it lays the Penalty, not because they do Mischief in a Park in such a particular manner, but because they are Trespassers there; and the Words of the Statute are not, that such and such as do so and so shall incur a Penalty, as the Words are in our Case. And if the Words of the Statute de Malefactoribus in parcis had been, that such as did offend so and so, should incur such and such a Penalty, none would incur the Penalty, but such as actually had chafed: And our Statute now lays the Penalty on one particular Person, under this particular Circumstance; and not as he is a Trespasser at large, but as he offends under such Circumstances, and the Case of Evans and Finch is very strong in the Point. 1 Cro. 474. Evans went in at a Window to a Chamber in
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the Inner-Temple, and took forty Pound in Money out of it, and all the while the other was upon the Ladder without side, and in View of him that went in; and held, that he that stood upon the Ladder, should have the Benefit of the Clergy upon the Statute of 39 Eliz. c. 15. And there no doubt they both were Principals in the Fact; but because Clergy is only taken away by the Statute from such as enter and take away, and that Finch did not enter, he had his Clergy: Yet if Clergy had been taken away from any that committed Burglary or House-breaking, there he should not have it. For the Statute did not take away Clergy upon Account of the Felony, but upon Account of Felony under these Circumstances of entering into the House and taking away: But in other Cases, Clergy is taken away from the Offence of which he is found Guilty; as in Case of Robbery on the Highway; there all that are Robbers shall lose their Clergy; and one that goes to rob with another, tho' he stand at a Distance from him and take nothing, yet he is a Robber: But if Clergy were taken away in this manner, that whoever shall meet a Man on the Highway, assault him so and so, and do rob him, shall lose his Clergy, in that Case an Abettor would not lose his Clergy, if he were not within such a particular Circumstance, and strictly within the Description.

Obj.

Obj. The Case of a Rape, whoever shall ravish a Woman, shall lose Life and Member, and Clergy is taken away by the Statute, and the Abettor shall also lose it.

Resp.

I Answer, The Reason of that is plain, for there the Act changing that which was Trespass before, into Felony, the very Species of the Offence is altered thereby; the Abettors of that Crime must be Felons, because they were guilty of that Fact which is now Felony: And the Accessories before and after shall be Felons, because they were aiding, inciting, &c. to a Fact which is Felony. And every Man that procures a Felony to be done, is a Felon: So of a Crime of a higher Nature; as if an Act of Parliament had made a Felony Treason, they that should be Accessories, shall be now Principals, because the Species of the Offence is altered. And there is a vast difference between both Cases; for one alters the Nature of the Offence, the other only raises the Penalty, when the Offence is accompanied with such and such Circumstances; and per Lui they that are Procurers of a Fact,

Just, can't be called Aiders and Assisters in it, but may be said to be aiding and assisting to it. And my Brothers have not quoted one Case that warrants their Conclusion: And that he had known the Case of Evans and Finch enquired into, and scanned Once; and that he himself had ordered the Record to be brought to him, and that Judgment is, as it is reported by Cro. And he said, it was an easy Answer to a Case, to say that it was a nice one: But he said, the Authority of it was never impeached, and if it had been in Trespass, he that stood upon the Ladder would have been Principal. But when the Act took away Clergy under such a particular Description and Circumstances, it was quite otherwise. And he said, The Case of Page and Haywood agreed in point with the Reason of this; and if two quarrel, and a third Person is the Incendiary and puts them on, and so in Truth is the worst of the three, and one of the two stab the other; he that stabs shall lose his Clergy, and he that set him on shall not; and the Reason is, because one is within the Description of the Statute, and the other not; for Clergy is not taken away from the Offence of Manslaughter, but from the Person committing Manslaughter so and so; yet in Truth he that does encourage the other to stab, in Consideration of Law is as much guilty as the other, of the Manslaughter. But upon the Statute of Malefactors in Parks, the Statute does describe the Offence as a common Trespass, and raises the Penalty upon such common Trespass done in a Park: But here the Statute raises the Penalty upon a Person who shall, in a Park where Deer are usually kept, &c. And therefore this being not within the Letter of the Act, ought not to be brought within the Equity of it. And he concluded that the Conviction ought to be quashed; but the Court was against him.

Holt, Upon a Motion for a Prohibition to a Suit in Spiritual Court for Tithe-Wood. One may prescribe in a non Decimando of Wood, or it is a good Plea that it is for Bows, Lopping, Germs, &c. of Timber-Trees of 20 Years standing; and if that Plea be denied below, it is good Cause of Prohibition, but if they receive and traverse it, they may try it here. And per Holt, You never are too late for a Prohibition after Sentence in any Case but one, and that is where the Suit is out of the Diocese, upon the Statute 23 H. 8. you come too late after Sentence, because by pleading you own their Jurisdiction.

Prohibition:
Tithes of
Wood.

Smith *versus* Cross.

*Certiorari
Teste.*

PER Cur. Whereas a Certiorari issued to the Court of Ely, tested the 12th of March, 11th of the late King, returnable in Easter-Term, to certify up all Pleas tunc nuper levat; and the Plea was levied after the Teste and before the Return. And per Cur. It was well removed; for a Certiorari, as well as a Recordare, shall remove all Pleaints pending at the Time of their Return.

Hardesty & Goodenough.

*Restitution.
Forcible
Entry.*

Inquisition of a forcible Entry, removed hither by Certiorari, at the Suit of the Defendant; Page moved for a Procedendo before filing it, upon Suggestion that the Defendant had got Possession of a House, in which there were great Store of Perishable Goods, and that now he would by this means keep it till the Goods would be all spoiled. Per Cur. We may award Restitution immediately tho' we file it, if the Defendant does not plead three Years quiet Possession immediately before the Force, and that his Estate does yet continue according to the Statute of 31 Eliz. c. 11. And per Cur. The Party ought to be ready with their Plea in such a Case as this; for one may justify a forcible Entry, if he were three Years in quiet Possession immediately before, and that his Estate doth still continue.

Austin & Crisby.

*Two Sci.
Fac. of the
same Teste
but several
Returns.*

Executors brought a Sci. Fac. tested the 22d of October, returnable the 14th of November, and a second Sci. Fac. of the same Teste returnable the 23d of November; so by Rule of Court, Defendant had four Days from the Return of the second Sci. Fac. to plead, which indeed was all that remained of the Term: They did not plead; the Plaintiff takes out a Fi. Fac. returnable the same last Day, to warrant a Testatum. And per Cur. It was well; for tho' the Defendant has four Days after the Return of the second Sci. Fac. to plead, yet that is a Favour to him; when he does not plead, the Judgment is of the Day of the Return of the second Sci.

Fac.

Fac. And he may very well take out a Fi. Fac. after to warrant the Testatum; and the Secondary remembered a Case, where a Fi. Fac. was returnable before the Judgment affirm'd, and held good in Favour of Execution to warrant a Testatum.

Gidden & Drury.

Defendant being under Arrest for a just Debt to get his Liberty, consented to give a Warrant of Attorney to confess Judgment to the Plaintiff; and there being no Attorney by, the Plaintiff did really discharge, as he pretended, the Bailiffs before the Warrant executed. Upon Examination of the Matter, Holt declared, he would be very well satisfied by Affidavits, that the Bailiffs were so discharged; so as if the Defendant had refused to execute the Warrant, they would not come again and seize on him, and that he would have Reason so to believe before he would let the Judgment stand; and though this were Debt for Money due upon a Mortgage, yet he said there ought to be Bail.

Judgment.
Warrant of
Attorney.

Bail.

Holt in a Case between Hopkins and Gery, declared, If a Banker or Goldsmith who has many Peoples Money, will refuse Payment, yet keep his Shop open, and as often as he is arrested gives Bail, he may by that Means give preference of Payment to his Friends, and when he has done, he runs away, yet such Payment shall stand against a Commission of Bankruptcy. And this was practised in the Case of Sheppard the Banker, who was almost arrested every Hour in the Day for several Days before he went off, and yet gave Bail as often, and paid his Friends, and then went and rendered himself in discharge of his Bail. And he put this Case, If A. knows B. a Goldsmith, whose Notes he has, to be in a declining Condition, and C. to whom A. owes Money, comes to demand it of him, upon which A. asks him if he will take B's Note in Payment, and he is willing to take it, and A. gives it to him; he said, he doubted if this be not good Payment, because here was not any Artifice or Surprise used. But A. goes to buy Goods of another, and offers such a Note in Payment; and the Party replies, I will take it if he be a good Man, and the other affirms him to be good, though he then knew him to be otherwise, that will not be good Payment.

Bankrupt,
Arrested.
Bail.

Mulso

*Mandamus
Writ.*

Mulso moved for a Mandamus to commit Administration to J. S. Curia. We can't do that, but we may, to grant Administration to J. S. or next a-kin according to the Statute.

Courtney Attornat. Cur. & al.

*Error.
Abatement.*

DE B C upon a Judgment in the Common-Pleas pending a Writ of Error, and that Matter pleaded in Abatement.

Superfedeas.

Holt. It's hard a Writ of Error should supersede Execution upon a Judgment, and not supersede an Action to be brought thereupon; for if there be a Judgment against a Testator who is also bound in a Statute, the Executor may bring a Writ of Error, and pay the Statute, notwithstanding the Judgment be after affirmed. Vide Yelv. 29. Cro. Eliz. 822.

Powell. It has been held in the Exchequer-Chamber, not to be a good Plea, because it is upon another Original, and a collateral Matter; but that the Court would shew all manner of Discountenance of it, and therefore would not hold the Party to Bail.

Holt. Though it be a new Original, yet it is no collateral Matter, but the Judgment on which the Writ of Error is brought is the Gift of the Action. And as to the Case in the Exchequer-Chamber, he said he had spoke to Treby Chief Justice about it, and that he had informed him, it had gone off upon another Matter, viz. That the Conclusion of the Plea was ill, for it was pet. Judicium si the Party responderi debeat till Judgment affirmed, and not pet. Jud. de Billa or Brevi. And the Case of King and Tuke was remembered, where it had been held a good Plea in Abatement; and the Court gave no Opinion, Vide Mich. 5 W. & M.

*Principal,
Interest,
and Costs.*

Per Cur. All Bail put in one is not in Court, to move to bring in Principal, Interest, and Costs.

Holt

Holt. I never knew Money brought into Court, and it struck out of the Declaration in Debt, though it has been done upon a Bond with Condition in Debt for Rent, and in a Mutuatus est; and he said he had known it done in Replevin, the Distress being for Rent. And the first Motion ever made for bringing Money into Court upon a Mutuatus, had been done by Levinz in Keeling's Time. Note, here it was Debt upon Articles.

Money brought in-
to Court.

Note.

Blainfield & March.

A Seaman dies in the Voyage: The Captain, according to the Usage among them upon such Occasions, takes all his Goods and sells them at the Mast, and makes an Inventory of them, and of the Rates he sold them at, and delivered it to the Administratrix at his Return, who brings Trover for the Things just as they were mentioned in the Inventory, and recover'd just the Value for which they were sold in Damages. One Item in the Declaration was, That the Intestate had been possessed of duodecim dimid. Thecis de (Spirits) with a Dash as here, (*Anglice*, twelve half Cases of Spirits) and also fifty Gallons Aquæ callidæ, (*Anglice*, fifty Gallons of Hot-waters.) At the Trial of this Cause before Holt at Guildhall, he held, That this being Trover upon the Possession of the Intestate and Not guilty pleaded, that the Defendant can't give in Evidence a Will made and Executors appointed, but that ought to have been pleaded in Abatement; But if Trover had been on the Possession of the Administrator, there, upon Not guilty, he might take Advantage of that Matter in Evidence. And if an Executor bring Trover upon the Possession of his Testator, upon Not guilty, he shall not be put to prove himself Executor; Secus if he had brought it upon his own Possession. And he farther held this Usage of selling Goods of dead Seamen at the Mast to be void. After Verdict it was moved in Arrest of Judgment by Branthwaite, 1. That it is uncertain what is meant by Cases. 2. That the Quantity ought to appear. 3. Spirits is of an uncertain Sense. 4. It ought to have been put into Latin, since it has a Latin Word, or with a framed Word and an *Anglice*; for if Words be so uncertainly laid, that it is not known what is meant by them, it is ill: But if they be insensible Words, no Damages shall

Trover.
Evidence,
or Plea in
Abatement.

Arrest of
Judgment.

be intended to be given for them, and this was agreed to per Cur. And they all held, That Trover will lie for a Case of Tub, because it is an individual Thing; but if one bring Trover for a Tub of Water or of Beer, without shewing how much it contains, they inclined that it was incertain, though it shall be understood to be for the Tub and the Beer: But it was agreed, it would lie for a Trunk of Linen, for a Library of Books, &c.

Mountague contra. Styles 370. Trover by Carrier, and a Trunk of Linen and other Matters; good after Aerdia. Action for burning the Defendant's Barn, per quod he hath lost several Goods, & quædam Ornamenta pro Equis; good after Aerdia. 1 Keb. 825. 1 Vent. 17. The Rule before put, if Words be insensible, Damages are not given for them; and if they have any certain Sense, then it will be well; and he said, a Case of Brandy or Spirits, was as well known among Seamen, as a hundred of Fruit or a Bottle of Wine among others. Vide 2 Ro. Rep. 154. for Goods to the Value of 300 l. 1 Sid. 98. Trov' pro duobus Plancis Granariis, (Anglice, Planks of a Granary,) good, because confined to a certain Use and Place. Stiles 338. for a Library of Books, without saying how many or what Books. Good for a Piece of Brandy. 1 Lev. 303. pro quadam Parcell. Fili, good, 2 Saund. 74. pro decem paribus Tegulorum & Velorum. (Anglice, Curtains and Wallance) 1 Lev. 301. De tribus Struib. Fœni, (Anglice, three Cocks of Hay) 1 Keb. 237. De duoden. fili, (Anglice, a Dozen of Thread) De uno Messuagio, (Anglice, the Sign of the Cross Keys) Stiles 419. Cro. Jac. Wood versus Smith, De uno plumbo, &c. for a Sack of Corn.

Opinio Cur.

Holt. One may have Trover for a Piece, though some be larger than other; and a Library of Books are easily ascertained by the Place they were in, and asking what they were worth in the whole. And he put the Case of Trover, of so many Ralis & Palis, (Anglice, Rails and Pales) and though here the Word Gallon was said to have a certain Latin Name, that is Congius, yet Holt said, our Gallons are not the same with that of the Romans; And the Case being moved at another Day upon the Word Spirits, which was said was English; whereas by the Statute of H. 6. all Pleadings are to be in Latin; the Court held, That a Case of Spirits was certain enough, and that Spirits with a Dash might be well taken

taken for Spiritibus ; and there is the Word Galo galonis, or Galona galonæ, to be met with in Spelman for an English Measure containing eight Pints, called a Gallon : And per foram Cur. Plaintiff had Judgment.

Judgment.

Steward & Eddy.

M Andamus to grant Administration to the Wife of the Intestate or next of Kin, and it was shewed, That there was a Will pretended below, and adjudg'd no Will ; and an Appeal of that Sentence, which being a Suspension thereof, the Rule for the Mandamus was discharged, per Cur.

Mandamus for an Administration.

Booth & Johnson.

In Assumpsit, Plaintiff declared, That in Consideration the Plaintiff's Testator did at the Request of the Defendant, receive as Guests into his House such Children and find them Necessaries, he the Defendant did promise to pay the Plaintiff's Testator what it should come to. Defendant pleaded the Statute of Limitation ill ; and the Plaintiff demurred, and had Judgment in Common-Pleas, and Error thereof brought here, and common Error assign'd. Broderick for the Plaintiff in Error. The Agreement was to receive such Children, ut Hospites, into the Testator's House, and to find them Necessaries ; and Averment is, That he received them into the House and found them Necessaries, without saying that he had received them ut Hospites, and the Law does annex several substantial Privileges to the Condition of an Hospes ; so that to receive one generally into an House and finding him Necessaries, is very different from receiving him as Hospes, and therefore the Agreement not pursued ; and Hospes is a distinct Thing from Servants, Apprentices, &c. And yet as it is averr'd here, it might be, that they were received as Servants or Apprentices ; and where one declares upon an express Agreement, one must bring himself expressly within it. 2 Leo. 53, 72. 1 Sautd 6, 7. 1 Sid. 309. Yelv. 87, 175. 2 Cro. 245. 1 Jones 441. all upon a Variance from the Agreement.

Error.
Variance from the Agreement.

Parker contra quoted Poph. 193.

Holt,

Opinio.

Holt, C. J. None of your Cases comes up to the Case in Question; for the Case of Hargrave and Rogers, 2 Cro. 45. Yelv. 52. was, A. bound himself in a Bond, with a Condition, That a third Person should appear to an Action upon eight Days warning; and that if he were condemned, then he would answer the Condemnation. The third Person appears in an Action without eight Days Notice, and is condemned, that shall not forfeit A's Bond; for he being a third Person, can't do an Action to alter the Terms of A's Agreement; as if A. be bound to B. to pay him 100 l. B. may take any collateral Satisfaction for it: But if the Condition were to pay C. 100 l. there C. shall not receive any collateral Satisfaction to save the Bond; for he can't alter the Terms of an Agreement made between Strangers. And as to the Case in Jones 441. the Consideration is, That the Plaintiff shall procure J. S. to renounce Administration; so there is an Act to be done by J. S. to entitle himself to an Action; for if he does do nothing, though the other renounces Administration, he has no Cause of Action; for the Agreement was not to pay so much Money, if the other renounced Administration generally, but if J. S. did procure him to do it; so that Case quite differs from this. And as to the Case of St. Catherine's Hospital which you quote out of Leon. the Agreement must have been thus: In Consideration that A. at the special Instance and Request of B. would build a House for B. that then B. would pay him so much Money for it. And in his Declaration he does say, That he did build the House, but does not say he did it at the Request of B. and he needed not to do it; for the Agreement was not, That he should build a House when the Defendant did request him, but the Agreement was absolute to build a House, and to that Agreement he was brought at the Request of the Defendant; and he quoted, 2 Cro. 404. 1 Cro. 194. In Consideration that the Plaintiff at the Request of the Defendant would marry the Defendant's Daughter, he promised to give him so much Money. And the Plaintiff in his Declaration avers, That he did marry her, without saying that it was at the Request of the Defendant; and held to be well in it self without any Request or Help of a Verdict. And he put a Case, where the Agreement was. That the Plaintiff should put his Son as an Apprentice to the Defendant for seven Years, and that the Defendant should find him Meat, Drink and Cloaths. The Plaintiff brought his Action against the Defendant,

I

with.

without averring he had put his Son to him for seven Years ; and held, that the Action did not lie, for there it was part of the Agreement, that he should put his Son to him, and the defendant was not to provide for him, if he had not been put to him as an Apprentice for seven Years, Vide 2 Jones. And per lui, the Case in Yelv. 175. was against all Reason. And if the very Case in Terms were to be judged over again, he would be of a contrary Opinion to it ; for it was to pay so much Money before the Plaintiff did take his next Journey to London, and the Exception taken, That the Plaintiff had not averred that the Journey mentioned in the Declaration, was the Defendant's next Journey after the Agreement ; for if it were the next, then by their own Confession, the Action lay ; and if it were not the next, then there was another Journey before, and then too the Action well brought. And he put the Case in 2 Saund. 873. in Consideration that the Plaintiff's Intestate at the Request of the Defendant, did find him diversa Vestimenta & omnia Materialia adindè spectant', he promised to pay him all that he should reasonably deserve for the same. Plaintiff brings an Action, and avers that he did find diversa Vestimenta & Necessaria præd. and not a Word mentioned of Necessaries, before but only Materialia, and that he deserved so much for them : Yet it was held good. And this was upon a Judgment by Default moved in Arrest of Judgment, upon a Return of a Writ of Enquiry of Damages, Vide Stiles 163. the best reported Case in the whole Book, for it is plainly and sensibly reported : The Agreement was, That in Consideration the Plaintiff would deliver to the Defendant's Son, so much Ware as he should desire, the Defendant promised to pay what they should be worth ; and the Plaintiff avers in his Declaration, that he did deliver such Goods to the Defendant's Son, which were received by him, without saying it was at his Desire : And that was held good, without any respect or help of a Verdict ; for the Acceptance of the Son is Tantamount to a Desire, though he never did desire him. So here is an Agreement, That in Consideration that the Plaintiff should take into his House the Defendant's Children to be his Guests, the Defendant would pay him for their Diet what it should be worth ; and the Breach assigned is, That he did take them into his House and did diet them, &c. without saying that they were as Hospites : But sure the Thing speaks it self, and they shall be intended to be as Guests, if the contrary don't appear of the other Side. And if the Word Hospes had not at all been in the Agreement,

Judgment
affirmed.

it would be intended prima facie, That he was to receive them as Guests; yet upon the Evidence that he agreed to take them into his House, and find them Meat and Drink, he could not be nonsuited, and the Averment is full and compleat as can be; and it would be a very foreign Intendment to take them to be Servants or Apprentices, or other than Guests; and if such a Thing were, it ought to have come of the other Side. And per Powell, In this very Case it was held in the Common-Pleas, That taking one into his House and finding him with Necessaries, was to receive him as a Guest, as much as if it had been so express'd, for the Words import so much; and if it were not so, the Defendant should have come with a Bene & Verum est, and confess the receiving and finding Necessaries, but alledge that they were there as Servants, &c. And Judgment affirm'd per tot. Cur.

Sir Richard Rains and the Commissary of the Diocese of Canterbury.

Admini-
stration.

ONE Rogers a Seaman died beyond Sea: The Place of his Habitation while in England was Sandwich within the Diocese of Canterbury, and he had Bona notabilia in other Dioceses within the Province of Canterbury, and the Commissary of the Diocese commits Administration to the Wife, and a Creditor of the Intestate is set up in the Prerogative-Court, to cite in the Woman to have her Administration repealed; and to this Suit, a Prohibition was moved for, and a Rule nisi to Day. And now the Judge of the Prerogative-Court alledging that this was in Derogation of his Jurisdiction, which he desired to maintain; and it appearing on the very Suggestion, that there were bona notabilia, it was urged, That that was a Confession that the Administration committed by him was void, and none ought to be prohibited to repeal a void Administration.

Holt. We do not prohibit you from committing Administration, which you may do if the Administration committed by the Commissary, be void as you say; but we prohibit the repealing of an Administration, which for ought we know is duly committed; and if it be by the Archbishop, Quatenus he is a Metropolitan, though there be no Bona notabilia

notabilia, it is good till repealed; and if it be void, he may commit a new Administration without any more ado, and then let the two Administrators contend the Matter between them: But we will not repeal this, because it is in Derogation of your Jurisdiction below; for you your selves would commit it to this Person that now has it. But all the Question is, Whether you or they ought to grant it of Right? And where you both pretend Right, it will be hard to let you be your own Judge; and all depends upon the Constitution of the Province of Canterbury; for if there be such a Usage for them to grant Prerogative Administration, it is hard to hinder them of it; and the Matter being thus, 'tis fit a Prohibition should go, and then we will give Judgment final, and then you may bring Writ of Error if you please.

And here it was said, That if Administration be committed in a Diocese where there are Bona notabilia, though such Grant be ipso facto void, yet they don't grant a new Administration in the Prerogative-Court before they repeal that, and in that Case they shall not be prohibited: But this here is different, being a Question of Right. At last it was propos'd as an Expedient, to try the Question, that Sir R. R. should bring Case against the Commissary, for granting a Prerogative Administration to the Prejudice of his Jurisdiction, or that he should bring an Indebitatus Assumpsit for the Fees, as for Money received to his Use. And the last was done by Consent.

Taylor & Rains.

FEME before Marriage had Articles of Settlement made with her intended Husband to this Purpose: She being possessed of Lease for Years, the Articles were, that such Person should have the Profits of the said Term, as the Wife should by Writing under her Hand, or by her last Will appoint. The Woman the Day before her Marriage makes a Will, devising the Trust of the Term to B. and then marries, and after her Death, the Executor appointed in that Will would prove it in the Spiritual-Court, and the Husband moved for a Prohibition, upon Suggestion, that she was a Feme-Covert at the Time of her Death, and therefore could not make a Will or Executor. 4 Co. Forse & Hemblinge's Case. And it was agreed now by the Court and Bar, That a Feme-Covert

Baron and
Feme.
Marriage-
Articles.

Covert could make no Will, but either as Executrix, or by Consent of her Husband, or of such Goods and Chattels, as by Marriage are not given to the Husband, and that likewise by consent of the Husband. And it was agreed by the Court, That this Will though in pursuance of a Settlement or Articles before Marriage, was not such a Will of which they had any Jurisdiction below, but it amounted to an Appointment in Equity, who should have the Trust according to the said Articles. And it was farther adjudged, that if one has the Trust of a Term for Years and dies Intestate, his next of Kin should have Administration of it, and Administration may be granted quoad, &c. as well as an Executor may be quoad. And it was likewise declared, that the Way here had been to grant Administration to them to whom he had appointed the Trust, and not to proceed by Way of Probate of Will; and held a Prohibition might go after Sentence in this Case per Cur.

Hart & Longfield.

Declara-
tion.
Demurrer
to part, and
Issue to part.

THERE were several Counts; and Demurrers to some, and Issues taken upon others. And one to which there was a Demurrer was this; the Plaintiff declar'd, That whereas such a Day and Year the Defendant was indebted to him in such a Sum, for nourishing Edward Longfield at the Request and Instance of the Defendant, he the Defendant did promise to pay him. There was also a Quantum meruit for nourishing the said Edward Longfield for the same Time.

Exception 1.

The first Exception was, That an Indebitatus Assumpsit did not lie in the Case, & Vid. Mo. 701. Cro. Ca. 107, 194. A. desired B. to be Attorney for J. S. and undertook to pay him his Fees, and such Fees as he should give to Counsel. And adjudged, That an Indeb. would not lie against A. 2 Vent. 36.

Exception 2.

Second Exception was, That the first Declaration being an Indebit. for nourishing of Edward Longfield for such a Time, there is likewise a Quantum meruit for the same nourishing which is contradictory, that there should be one Agreement to pay so much, and another to pay a Sum incertain, and both stand.

Holt. There can't be two Agreements, and both stand for the same Thing at the same Time; for in such Case, the last would destroy the first, and the last would only stand; but the Way had been to averr them to be different Children; and that is the right way, when a Quantum Meruit and Indebitatus is brought for the same Thing; for here you ought to multiply Edward Longfield as often as you multiply your Declaration. But as to the other Objection, Can't A. be indebted to B. for doing good to C.? For if A. should say to B. Give such a Quantity of Goods to C. upon my Account, and I will pay you, or make J. S. a Cart, and I will pay you for it; sure an Indebitatus will lie against him (A.) in that Case, and the Sale properly is to him upon whose Request it is given, and not to him to whom it is given: But an Indebitatus will not lie for being an Attorney to a third Person, because in that Case his being an Attorney on Record, is what entitles him to Debt; and therefore, if another do promise to pay, yet he, for whom he is an Attorney on Record, is not discharged, and therefore the other can't in that Case be liable to an Indebitatus. And in the Case of the Cloth put before, no Action lies against him to whom it is deliver'd, but only against him upon whose Request it is sold. And the Court directed the Plaintiff to enter a Non Pros. upon all but the first, and take Judgment upon that, and so it was done. Judgment.

Domina Regina & Pigeonry.

Indictment; for that he did put Quoddam Venenum, (Anglice, Antimony) into a Cup of Beer, and gave it to J. S. Poison.

1st Exception was, That Venenum is Latin for the general Word, Poison; but not for any Species of it, as this is; but this Exception was over-ruled upon the Case in Hard. 361.

The 2^d Exception was, That he was called by the Addition of Alchymista, which was none at all. But the Court would not quash it, having a fresh Memory of a foul Practice not long before by intoxicating Physick.

Sylvester's Case.

Alien
pleaded. De-
murrer.

HE was a French Refugee ; and to an Action brought by him, it was pleaded in Abatement, That he was an Alien Enemy born, under the Ligeance of the French King, then in War with the Queen ; and to this there was a Demurrer. And per Cur. The Plea is good ; for tho' he be a poor Refugee, and under the Queen's Protection, which does enable him to sue, yet whether his Protection be special, or general as by Proclamations, he ought to plead it. And per Cur. If a Writ be abatable in its self, as being for a wrong Man, Defendant may say Petit. Jud. de Billa, because there the Action is ill conceiv'd ; but where the Writ is well conceiv'd, but bad for Misnomer, Defendant can't conclude so. And if an Alien Enemy come into England without the Queen's Protection, he shall be seized and imprisoned by the Law of England, and he shall have no Advantage of the Law of England, nor for any Wrong done to him here ; but if he has a general or a special Protection, it ought to come of his Side in Pleading. Per Cur.

Judgment
against ca-
sual Ejector.

Per Cur. To have Judgment signed against a casual Ejector stand, all Things must be very fair of the Plaintiff's Side, for the Defendant loses his Possession by a fictitious Proceeding.

Domina Regina & King.

Indictment
of Forgery.
Latin.

AN Indictment of Forgery removed up out of London, and demurr'd to here. The Caption was, That per Sacramentum of the Jury by the Names proborum & legalium hominum, qui pro Domina Regina pro corpore Com. præd. triat. jurat. & onerat. existentes præsentat. existit, quod the Defendant, &c. falso & malitiose, &c. quodd. scriptum Obligatorium fabricavit & contrafecit. And several Exceptions were taken.

Exception 1.

1. To the Caption, there being no Verb to the Nominative qui triat. jurat. & onerat. existentes ; and so it was said to be Nonsense.

2. Exception was, That the Crime charged was the Except. 2.
forging falsly, whereas it could be no Crime if it was not truly
forged.

3. If it were a Forgery, it could not be Scriptum Obligator. Except. 3.
for a forged Deed is not Obligatory; therefore it should be
for forging quodd. Scriptum, purporting a Writing Obligatory.

4. Exception, That a Forgery to the Prejudice of no- Except. 4.
body can't be a Crime, and the pretended Bond could be to
no-body's Prejudice; for it was a Bond to the Sheriff of
London, for the Appearance of a Person under Arrest a die
Purificationis in octavis Diebus, and there is no such Day,
and therefore the Bond is not according to the Statute, ideo
void; and by Consequence the Forgery no Crime, because
no Prejudice to any.

But it was resolved by the Court, 1. That this Indict- *Opinio Curie.*
ment is to be considered as if it were an Indictment of High-
Treason; and if it were such, it would be good notwith-
standing the Caption, for that was no Incertainty in the
Charge.

And per Holt, What Matter is it whether a Man be hang-
ed by good or bad Latin, and he could shew worse Latin than
this in many Writs, as in the Writ of Adjournment, which
runs thus, Rex Justiciar. suis ad Placita coram nobis, &c.

And as to the 2d, The falso fabricavit is as much as
to say, That he being a false and malicious Man, did forge;
and not that the Forgery was a true Forgery, but the Thing
forged was not true, but false.

And to the 3d, That it could not be Obligatorium if it
was forged, it is not in Truth and Reality binding, but in
Shew and Appearance it is; and that is enough: So it is
an Obligation though a false one.

To the 4th. It was held first, that the Octavis Diebus may
be well understood for the Octave of the, &c. Besides, these
Bonds are not meerly void by the Statute, but only voidable;
and therefore you must plead the special Matter, and not non
est Factum: And you may say, That a forged Bond binds
no-body,

no-body, (as in Truth it does not) and infer from thence, that it is no Crime to forge. And the Queen had Judgment, and King stood in the Pillory; though the Case of the King and Queen (Vide Thorowbridge, Trin. 6 W. & M.) was quoted, where Judgment had been revers'd upon a Writ of Error for want of a Nominative Case to the Verb. And here the Caption wanted a Verb to a Nominative Case,

Brook & Bishop.

Arrest of
Judgment.

Entire Da-
mages, &c.

Opinio.

Term ad-
journd.

Judgment.

Trespas for breaking the Plaintiff's Close, and entering into it, treading his Grass, and cutting so many Trees to the Quantity of ten Cart-loads, and carrying them away on such a Day, Transgressionem præd' continuando, from such a Time to such a Time. And after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that Damages were entire, and part of the Trespass did not lie in a Continuando, and yet Damages were given for that too. And though it were objected, If it could not be continued, no Damage could be given in Respect of according to Butler and Hodges's Case; yet under this Continuando several new Acts of Trespass might be given in Evidence, and so Damages recovered for them.

Per Cur. The right way in Trespass for repeated Acts of Trespass would be, that on such a Day, and Diversis aliis diebus & vicibus, between such a Day and such a Day, the Defendant did so and so, Vide 20 H. 6. But in this Case the Continuando is impossible, and therefore no Damages could be given for it, and the only Mischief possible, would be that of giving other Acts of Trespass in Evidence by Pretence of it: But that ought not to be suffered, and therefore not to be intended.

Another Exception was, That the Declaration was generally of Easter-Term, and yet it appeared that the Trespass was committed after the 21st of April, which was the Quinden. Pasch. But per Cur. That Term was adjourn'd by Proclamation to the second Return, which was the 29th. All Declarations shall refer to that; and here the Plaintiff had Judgment.

Domina Regina & Foxworthy.

HE was attainted of Murder, for the Murder of one who had come in Aid of the Constable to arrest him upon a Warrant. And having obtain'd his Pardon, he was brought to the Bar to plead; and it being read, the *Ward Attincturas* was not in. Pardon of Murder amended.

Whereupon Holt said, He would consider before he would allow it, upon which he was remanded; and at another Time the Pardon being amended, and *Attincturas* put in, he was brought up, and the Pardon allow'd, which was upon Condition that within such a Time he would repair on board one of the Queen's Ships, and serve three Years in the West-Indies on board it.

And Dee moved for Leave to charge him with an Action in the Custody of the Marshal: But for that if he could not pay the Debt or find Bail, the Pardon might be thereby frustrated, the Court would not grant Leave.

And it was agreed, That if in this Case after the Allowance of the Pardon he had broke the Peace, he might notwithstanding the Pardon, be detained for that Offence to the Destruction of his Pardon; and in such Case he would be brought up here again, and ask'd, What he had to say why Sentence should not pass? And if he pleaded the Pardon, the Attorney-General would reply the Condition and Breach, &c. Note.

Robinson & Walker.

In Covenant the Plaintiff declared, That the Defendant and J. S. did convenire pro se & quolibet eorum, &c. That they or either of them would lade such a Ship at such a Place, and pay the Plaintiff for the Freight, &c. And the Defendant pleaded in Abatement, that the other Covenantor was in full life, not named in the Writ. And it was agreed by all, That *Obligamus nos & utrumque nostrum*, was joint and several. Covenant.

Q q

But

Nota diver-
sity.

Judgment.

But Holt declared, he thought there might be a diversity between A. and B. *convenient & quilibet eorum convenit*, and A. & B. *convenient pro se & quolibet eorum*; for in the first *quilibet eorum convenit* expressly severs the Lien, but *pro quolibet eorum* seems to go to the Thing to be done; that is, that they both or either of them would do it. And one may covenant, that he or A. will do such a Thing; so if two covenant that they or one of them shall do such a Thing, that is a joint Covenant only; and the Word *convenient*, and not *pro quolibet eorum*, makes the Lien. But *reliqua Cur. contra*. And no Difference between this and the Case of *Obligamus nos & utrumque nostrum*. And Judgment *quod respondeat ulterius*.

Cutting & Williams.

Error.

Entire Damages.

ERROR of a Judgment in Com' Banc. several Counts below, and one of them was upon the Custom of Merchants, declaring upon a Note given by the Defendant to the Plaintiff, promising to pay him so much Money and several Damages, but one Judgment for the Plaintiff below for the several Damages; and now it was assigned for Error, That the Count upon the Custom of Merchants was void; and therefore there being one entire Judgment, all was void, and Judgment ought to be reversed in toto. And the Case of Martin and Clerk was quoted as an Authority in point.

Note here, Both the Damages were cast up together, and Judgment for them, with a *Quæ in toto se attingunt* to so much, that is, *quod recuperet damna sua prædict. assel. quæ in toto se attingunt* to so much, which Total comprehends both the Damages: But to maintain this, that is, that Judgment might only be reversed in part, the Case of Jacob and Mills in Hob. 6. Cro. Car. 349. were urged. Mo. 708. same Case in effect. But of the other Side was quoted the Case in Cro. Jac. 424. A Judgment in point to the contrary four Years after, where the Judgments are distinct and upon distinct Laws; as in Dower, where the Judgment for recovery of the Dower is by Common Law, and to recover Damages by the Statute of Marlbridge, or in a *Quare impedit*; for there is Judgment for the Church at Common Law, and for Damages by the Statute; and in that Case,

Judgment may stand for one, and be revers'd for the other. Aley 74. 1 Ro. Ab. 775. pl. 4. Action upon several Promises, and several Damages assessed, and one Judgment for both; and upon a Writ of Error it appeared, that an Action did not lie for one of them, and therefore Judgment reversed in toto. 1 Keb. 232. The Case in Hob. 6. is denied to be Law, and so was the Case of Bernard and Bernard. M. 22. Ca. 2. in B. R. 2 Keb. Stiles 121, 125. Assault and Battery against three, one whereof was an Infant, and all of them appear'd by Attorney and Judgment against all; and it was reversed in toto, because the Infant appeared by Attorney. 3 Keb. 199, 213. 1 Vent. 27, 39. 2 Keb. 506, 535. 2 Saund. 379. The Way had been to enter a Remittitur for that which is not maintainable, and take Judgment for the rest.

Holt. It has been held as you say in the Case of Jacob and Mills, but certainly ever since the Courts have been of a contrary Opinion. And there are but two Judgments in the Books, that favour that Opinion of reversing Judgment in part; and I remember to have heard it debated here many Years ago, and the Court then were of Opinion, that it would be bad in the whole; for the whole Judgment is wrong, for it is for more Damages than should have been recover'd, and not for so much Damage upon one Promise, and so much upon another Promise; for if it were so, it might perhaps be several Judgments, and in Consequence one might be reversed without the other: But the Judgment here is to recover Damna præd. which are the whole Damages. *Opinio Cur.*

And Powell said, he had known the Case of Jacob and Mills denied to be Law many a Time, and that there are twenty Resolutions to the contrary; that is, if a Remittitur be not entered for part, that it will be bad for all; for the Judgment is of the whole: And they were all of Opinion, if one of the Declarations were such, on which no Damages ought to be recover'd, it would be bad.

And per Holt. As to that Point, he had proposed it to all the Judges, and that they were all of Opinion, That a Declaration upon the Custom of Merchants upon a Note, subscribed by the Defendant to the Plaintiff for so much Money, or promising so much Money was void; for it tended to make a Note amount to a Specialty. And Judgment super inde was reversed in toto. Per tot. Cur. *Customs of Merchants.*

Owen

Owen & Atkinson.

Amendment
of the *Nisi*
prius Roll.

AFTER Plea pleaded, and Replication and Rejoinder to part, and Issue, Notice of Trial with Proviso as to the other, and Rule served to make up the Issue, to carry it down to Trial; and the *Nisi prius* Roll being engrossed in Parchment, but all the Proceedings above continuing in Paper, the Plaintiff had leave to amend upon payment of Costs. Note here, the Record of *Nisi prius* was made up, tho' the Record above was not; and that was said to be done frequently, and it is never denied to amend upon payment of Costs, while Things continue in Paper: Note also, a Case can't be carried down to Trial by Proviso, till the Issue is made up: And therefore the Defendant ought to serve a Rule upon the Plaintiff, to make up the Issue.

Grovenor & Fenwick.

New Trial
denied after
Trial at Bar.
Affidavit.

AFTER a Trial at Bar, and Verdict for Lessees in Ejectment, a new Trial was moved for, upon the merits of the Cause, and also upon an Affidavit brought into Court containing in substance, that the Defendant's Witnesses were kept back by a Report spread in Holland, where they were in their Way to England; that the Witnesses that were already come over, had been laid by the heels; but the Affidavit did not name any who had spread the Report, or that it was by the Agents or Persons employed by Fenwick. And tho' the Court were dissatisfied with the Verdict, upon several Reasons, one whereof was that the Trial lasted about sixteen hours, and abundance of Evidence were given on both sides, yet the Jury were agreed on their Verdict in half an hour's Time. Yet the Court would not grant a new Trial: And the Case of Gay and Cross heretofore was remembered; for the Court declared, that after a Trial at Bar they would not easily grant a new Trial, more especially in Ejectment, where the first Verdict is not peremptory; and where there is no foul Practice made appear in the Jury, or Party for whom the Verdict was; as keeping back of Witnesses, &c. in which Cases alone it was discretionary in the Court to grant it. And here they begged leave to mend their Affidavit, which was opposed for this Reason; that now they had learnt of the

Court

Court, what would do their Business, it would be dangerous to let them in to swear it: To which Holt said, That it was frequent in Chancery, after a Witness had sworn before a Master, to examine him again viva Voce in Court: But Sergeant Powis replied, that it was no frequent Thing so to do; for in all his Time, he had known it done but twice. And Powell declared his dislike of mending Affidavits, where the Party knew before what was necessary, and had not sworn it.

Cooper and the Hundred of Basingstoke.

IN an Action against the Hundred upon the Statute of Winchester, of Hue and Cry; a special Verdict was found at the Assizes to this effect, That the Plaintiff was travelling in the Highway, within the Hundred of Michel, Devon; that thereupon he was there assaulted, and set upon by several Malefactors to him unknown, who took Possession of him, and carried him into a Coppice hard by the said Highway, in the Hundred of Basingstoke, and there did rob him: The Question was, Whether the Hundred of Basingstoke be chargeable with this Robbery? And this Case was argued several Times at the Bar.

Hue and Cry.
Taking in one Hundred and Robbing in another, Action lies where the Robbery was.

And now this Term, the Ch. J. Holt declared the unanimous Opinion of the Court, that the Hundred of Basingstoke is chargeable. It has been endeavoured to maintain, that this Robbery was committed in the Hundred of M. but it is most plain upon the Words of the Verdict, that it was wholly committed in the Hundred of B. for without all question if these had been two Counties, as they are two Hundreds, and he had been taken in one County and carried into the other, and there robbed, the Robbers must have been tried, where the Robbery was committed: Now then if the Robbery be committed in the Hundred of B. by the express Words of the Statute it is chargeable, so that the Hundred where the Robbery is committed, shall be liable to make satisfaction for the Robbery: Now it is impossible in this Case to make the Robbery committed in the Hundred of B. to be a Robbery from the Time of the Assault, which was in the Hundred of M. for there is no manner of Reason to make a Relation in this Case; for it is no way like the

Opinio Curia.

R r

Case

Case of Murder; where the stroke is on one Day, and the Death on the other; there to some Purposes there is Relation to the first Day, but not to all Purposes; It has Relation to make all the Lands the Party had at the Time of the stroke given escheat, and to forfeit his Estate for Life to the King, but to other collateral Purposes it has not any such Relation: For if a Man be indicted, for that he gave a Mortal Stroke to A. on such a Day, whereof he languished till such a Day; and so the Jury does say, that the Party indicted did murder the Party slain on the Day of the Stroke given, it will be bad; but they may conclude he killed him on the Day of his Death. 4 Co. 41. In this Case there is no Robbery committed till the Plaintiff is in the Hundred of B. for there the taking away is, which is the Fact that makes the Hundred chargeable: Besides in the Case before put of the Relation; If A. give a mortal Wound to B. on the 3d of March suppose, whereof the Party dies the last of March, between these two Days C. has received and comforted A. or if a Constable had him in his custody, and suffered him to escape between the two Days, C. should not be accessory to the Felony, nor the Constable guilty of the Escape of a Felon. Vide 11 H. 4. 49. Pl. 401. The pardon of all Offences and Misdemeanors after the Stroke, and before the Death, pardons the Murder that follows: That is, Suppose Pardon be of all Offences committed by him before the 10th of March; that pardons the Stroke, and by consequence the Murder that ensues by the Death of the Party; but in our Case, there is not any colour for a Relation: For the Assault is not the immediate and efficient Cause of the Robbery, but is only the occasion or Cause sine qua non of it; therefore there is no necessity of a Relation to it; and if there be no Relation, then of necessity that Hundred must be liable, where the Fact is committed, and that is the Hundred of B.

This is not a new Case, but has been determined already. Hutton Dean's Case, A. is assaulted in one Hundred, and flies into another Hundred, still pursued by the Robbers in pursuance of the Assault, he is there taken and robbed; and there is as much Reason to make this Robbery relate to the first Assault, as there is in our Case; and there it is held that the Hundred in which he was robbed, should be only charged, that is, the Hundred in which the actual taking away was.

And the Case in Goldsb. allows this to be Law: Thieves came upon a Carrier and seized on him and his Horses, and drove his Horses into another Hundred, and there they rifled his Waggon; and the Hundred where the rifling was, was not chargeable, because it was a compleat Robbery, by taking the Carrier and the Horses into their Possession; and the rifling after does not make it a greater Robbery than it was before; but if the Carrier had been left in Possession of his Waggon and Horses, and only obliged to lead into that place, and there the Goods were taken from him, there the place where the Goods had been actually taken from him, had been charged. But the true Reason why the Hundred of B. stands charged is this; It is to be known that the Hundred is not charged because they did not prevent the Robbery, but because they have not taken the Malefactors after; for let the mischief be ever so great, if they apprehend the Malefactors within forty Days, as the Law stands now, heretofore within half a Year, they shall not be charged; then here is no Obligation on the Hundred of Michel, Devon; for there was no Robbery committed there, and the Robbery and charge does not come upon the Hundred, till it be compleated and consummate, and they fail of taking the Robbers within the Time limited; and for that default they are charged, and not because of any Robbery committed; and the Hundred is not bound to pursue a Man for an Assault, nor for a Battery even to Death, nor shall they incur any Forfeitures for not apprehending such Offenders; and in this Cause, there was nothing done in the Hundred of M. but the Assault; and if there be no obligation on the Hundred of M. to take the Robbers, then of necessity the Hundred of B. must do it, because the one or the other must.

Obj. Suppose an Assault be made in one Hundred by Day, and the Party is carried into another Hundred, and kept till Night, and then is there robbed in the Night-Time; it is not reasonable in that Case, that the Hundred where the Robbery is committed, should be charged, because the Robbery is by Night.

Ans. The remedy fails there, because there is no Reason to charge the Hundred where the Robbery was committed, because it was by Night: So if he be taken in the Highway by Day,

Judgment.

Day, and carried into a dwelling house within the Hundred, and there robbed, the Action fails, because the Hundred is not answerable for Robberies committed in a dwelling House; but if he had been carried from the Highway, into an empty Waste House and there robbed, I will not deliver any Opinion how that would have been: And he said they were all of Opinion the Hundred should be liable for a Robbery committed in a private Way. And per tot' Cur. Judic' pro Quer'.

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